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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

IN RE CARGILL, INCORPORATED,
Petitioner,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

While the district court judge was considering petitioner's motion to dismiss plaintiffs' antitrust complaint, he became involved in a personal real estate dispute and retained plaintiffs' law firm, thus entering into a relationship that apparently required his disqualification *sua sponte* under 28 U.S.C. § 455(a). The judge did not disclose the relationship during its course. When, however, the dispute was resolved to his "satisfaction" and he had paid his legal bill, he called a conference, for local counsel only, where he solicited and obtained local counsel's "waiver" in apparent violation of 28 U.S.C. § 455(e) and Canon 3(D) of the Code of Judicial Ethics ("the Code"). Four business days later, the judge issued a lengthy decision on the pending motion, at odds with applicable authority and in plaintiffs' favor. On petitioner's objection, he refused to recuse himself or to withdraw the decision. A divided panel of the court of appeals denied a petition for writ of mandamus. The court *en banc*, dividing 3-3, denied the petition for rehearing.

The questions presented are:

1. Whether, under 28 U.S.C. § 455(a) and the Code, a judge is required to disqualify himself promptly when he retains a law firm that is involved in a case before him to represent him in a personal dispute.

2. Whether any legal effect may be given to an alleged waiver of disqualification that is obtained in violation of 28 U.S.C. § 455(e) and Canon 3(D) of the Code.

3. Whether the court of appeals abdicated its responsibility to act under 28 U.S.C. § 1651(a) and acted in conflict with *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) when it refused to resolve the issue of the judge's apparent disqualification promptly and instead remitted the matter to an end-of-case appeal -- thus sanctioning a continuing appearance of impropriety, and relying on an invalid waiver and the "failure" of the petitioner to meet a supposed requirement, rejected by Congress, of "immediacy" in making any objection.

PARTIES TO THE PROCEEDING

In the underlying action, plaintiffs are Frederick Ashmore, David Boya, William Simone, and Richard Simeone; and the defendant, petitioner here, is Cargill, Incorporated, which has no publicly-held subsidiaries and no parent corporation. The district judge, by choice, was not a party to the mandamus proceeding.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND CANON INVOLVED 2

STATEMENT 2

FACTS 3

REASONS WHY THE WRIT SHOULD BE GRANTED 9

1. The majority opinion undermines the statute and the Court's prior holdings, and it is in conflict in several respects with decisions of other courts of appeals. 9

2. There is no statutory basis for giving any legal effect to a "waiver" of disqualification that does not conform to § 455(e) and that follows the judge's failure to disqualify himself in violation of § 455(a). 11

3. The court of appeals, by abdicating its mandamus powers, undermined the Court's objective that judicial disqualification issues must be resolved promptly. 18

4. Issues of the timing of an objection may affect the nature of relief, but do not permit the perpetuation of a violation of § 455 or damage to the administration of justice. 23

5. The opinion conflicts with the holding in *Liljeberg* on matters of remedy. 27

6. The issues presented are of great importance to the administration of justice and present a special need for uniformity of treatment. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: **Page**

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 28

Alexander v. Primerica Holdings, Inc., 10 F.3d 155 (3d Cir. 1993) 11

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 21

Ashmore v. Northeast Petroleum Division of Cargill, Inc., 843 F. Supp. 759 (D. Me. 1994) 2

Ashmore v. Northeast Petroleum Division of Cargill, Inc., 855 F. Supp. 438 (D. Me. 1994) 2

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 5

Berger v. United States, 255 U.S. 22 (1921) 19, 20

Duke v. Pfizer, Inc., 668 F. Supp. 1031 (E.D. Mich. 1987) 4

Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983) 11, 13

Heckler v. Ringer, 466 U.S. 602 (1984) 19

Table of Authorities continued

Page

In re Allied-Signal, Inc., 891 F.2d 967 (1st Cir. 1989) 22

In re Allied-Signal, Inc., 891 F.2d 974 (1st Cir. 1989) 4, 24

In re Cargill, Inc., 66 F.3d 1256 (1st Cir. 1995) 1

In re Drexel Burnham Lambert, Inc., 861 F.2d 1307 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989) 23

In re Georgetown Park Apartments, Ltd., 143 B.R. 557 (Bankr. 9th Cir. 1992) 4

In re Placid Oil Co., 802 F.2d 783 (5th Cir. 1986) 4

In re School Asbestos Litigation, 977 F.2d 764 (3d Cir. 1992) 24

In re United Shoe Machine Corp., 276 F.2d 77 (1st Cir. 1960) 23

Kerr v. United States District Court for Northern District of California, 426 U.S. 394 (1976) 19

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) ..... *passim*

Table of Authorities continued

Page

Mallard v. United States District Court for Southern District of Iowa, 490 U.S. 296 (1989) 19

Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 460 U.S. 1007 (1983), *on remand*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed at request of parties*, 469 U.S. 1200 (1985) 5

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) 21

Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) 3, 12

Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806 (1945) 22

Quinones v. Nettleship, Civil No. 82-3063 (D.P.R. Sept. 21, 1983), *order reprinted at* 595 F. Supp. 589 3

Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965) 3

Reilly v. United States, 863 F.2d 149 (1st Cir. 1988) 23

Table of Authorities continued

Page

Smith v. Sikorski Aircraft, 420 F. Supp. 661 (C.D. Cal. 1976) 4

Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir. 1965), *cert.denied*, 383 U.S. 396 (1966) 3

United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986) 10

United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) 24, 28

United States ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540 (1937) 21

United States ex rel. Greathouse v. Dern, 289 U.S. 352 (1933) 21

United States ex rel. Turner v. Fisher, 222 U.S. 204 (1911) 22

Whitehouse v. Illinois Central Railroad Co., 349 U.S. 366 (1955) 21

Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978) 19

Table of Authorities continued

Page

Statutes:

15 U.S.C. § 13 3

28 U.S.C. § 455(a) ..... *passim*

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1651 ..... 2, 7

Miscellaneous:

7 James W. Moore, *Moore's Federal Practice*, ¶ 63.07[2.-3] (2d ed. 1995) 14

E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* (1973) 20

Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on Courts, Civil Liberties, and the Admin.of Justice of the House of Representatives Comm. on the Judiciary, 93d Cong., 2d Sess. (1994) 12, 13, 15

Guide to Judiciary Policies and Procedures, Vol. II, Codes of Conduct for Judge and Judicial Employees, Nov. 1993 ..... 3, 14

H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974), *reprinted at* 1974 U.S.C.C.A.N. 6351 ..... 12, 16, 17, 20, 22

IN THE

Supreme Court of the United States

October Term, 1995

No.

In re Cargill, Incorporated,

Petitioner

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cargill, Incorporated ("Cargill" or "petitioner"), respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *In re Cargill, Inc.*, 66 F.3d 1256 (1st Cir. 1995) and reprinted at App. 14a-54a. The memorandum decision of the court *en banc* is reprinted at App. 12a-13a. The opinion of the United States District Court for the District of Maine, unpublished, is reprinted at App. 55a-73a. Opinions of the district court on related matters

are published as *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 843 F. Supp. 759 (D. Me. 1994) and *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 855 F. Supp. 438 (D. Me. 1994).

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1995. The petition for rehearing was denied on November 16, 1995. (App. 12a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CANON INVOLVED

The statutory provisions involved in this case, 28 U.S.C. § 455 and 28 U.S.C. § 1651, are set forth in the appendix at App. 1a and 5a, respectively. Sections of Canon 3 of the Code of Judicial Ethics, as approved by the Judicial Conference, are set forth at App. 5a.

STATEMENT

Petitioner moved, early in the proceedings, to disqualify the district judge, and to vacate an opinion rendered by him, based on his appearance of partiality and a related violation of 28 U.S.C. § 455. The district court denied the motion. A divided panel of the First Circuit denied petitioner's application for a writ of mandamus. The court *en banc* then divided 3-3 on the petition for rehearing, which consequently was denied.

FACTS

The essential elements giving rise to this matter are uncomplicated. Four former salesmen of a corporate division of petitioner alleged that they were discharged because they objected to violations of the Robinson-Patman Act, 15 U.S.C. § 13,[1/] and sought treble damages based on lost employment compensation. Petitioner moved to dismiss on grounds, *inter alia*, that such employees had suffered no "antitrust injury" and had no "antitrust standing," a position supported by overwhelming authority.[2/]

While the district judge was presiding over the case and actively considering the motion to dismiss, he hired Gerald Petruccelli, a "name" partner of plaintiffs' law firm, Petruccelli & Martin, located in Portland, Maine, where the court sat, to represent him and his wife in a personal real estate dispute. That relationship, authority holds,[3/] required the judge's

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1/ In proceedings elsewhere, these same plaintiffs claim that they were discharged because of age, ethnic discrimination, and other reasons.

2/ *See*, *infra*, n.5.

3/ The Committee on Codes of Conduct of the United States Judicial Conference has indicated that such a relationship requires recusal, absent waiver. *Guide to Judiciary Policies and Procedures*, Vol. II, Codes of Conduct for Judges and Judicial Employees, Nov. 1993, at V-25; *see Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *Texaco, Inc. v. Chandler*, 354 F.2d 655, 657 (10th Cir. 1965), *cert. denied*, 383 U.S. 396 (1966); *Rapp v. Van Dusen*, 350 F.2d 806, 814 (3d Cir. 1965) (*en banc*); *Quinones v. Nettleship*, Civil No. 82-3063 (D.P.R. Sept. 21,

(continued...)

disqualification under 28 U.S.C. § 455(a).

During the approximately three-week representation, the judge made no disclosure of the Petruccelli relationship, but worked on the pending motion.[4/] After Mr. Petruccelli resolved the dispute to the judge's "satisfaction" (App. 34a.), the judge paid his legal bill on January 10, 1994, and on the next day scheduled a conference, upon 24 hours' notice, for Wednesday, January 12, 1994, notifying only local Maine counsel. Petitioner's Maine counsel was not told, and, despite effort, could not find out, the reason for the conference. (App. 102a.)

At the conference, the district judge disclosed, but minimized, the Petruccelli relationship. (While formally addressing this matter on three occasions, the judge has not disclosed the substance of the matter.

3/(...continued)
1983), *order reprinted at* 595 F. Supp. 589; *Smith v. Sikorski Aircraft*, 420 F. Supp. 661, 662 (C.D. Cal. 1976). Other courts have viewed such a relationship as disqualifying, but have relied upon factors notably absent here, (1) the passage of substantial time, or (2) the withdrawal of counsel, in declining to require recusal. *See In re Allied-Signal, Inc.*, 891 F.2d 974, 976 (1st Cir. 1989); *In re Georgetown Park Apartments, Ltd.*, 143 B.R. 557, 560 (Bankr. 9th Cir. 1992); *In re Placid Oil Co.*, 802 F.2d 783, 786 (5th Cir. 1986); *Duke v. Pfizer, Inc.*, 668 F. Supp. 1031, 1036 (E.D. Mich. 1987).

4/ The statement in the court of appeal's opinion that the district judge first learned that the Petruccelli firm was involved in this case "at about the time that the attorney-client relationship ended" (App. 17a.), conflicts with the record, which indicates an earlier time. The judge stated that he learned about the conflict from the clerk of the court several days after the representation was first undertaken, but that he could not remember exactly when. (App. 75a.)

See, *infra*, n.9.) The judge affirmed that he was "morally certain" that he could preside; said only that disclosure of the relationship was "arguably" proper; and sought "to see if anyone had any objection." Plaintiffs' counsel, previously aware of the relationship, declared "[A]bsolutely no objection." The judge made an additional comment diminishing his relationship with the law firm. Petitioner's local counsel then said, "No objection." (App. 34a-35a.)

Having thus obtained counsel's "waiver," the judge announced that he intended to decide the pending motion to dismiss "within a week or so"; and then within four business days issued a lengthy opinion deciding the motion in favor of plaintiffs, in every respect -- contrary to prevailing authority, including that of the Court.[5/]

Plaintiffs' lawyers knew for weeks that their law firm was representing the judge, but they had said nothing, despite a litigant's responsibility to disclose

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5/ All six lower court cases addressing the issue under the Robinson-Patman Act had denied antitrust standing to sales representatives. Under the broader scope of the Sherman Act, such standing had been denied in ten appellate and district court decisions. The sole contrary authority was a split decision of the 9th Circuit, with now Justice Kennedy dissenting, (and one district court following it) that had been vacated and remanded by the Court; it was then reissued on remand with the same conclusion, over Justice Kennedy's second dissent, and the case was settled while review by this Court was again sought. *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 460 U.S. 1007 (1983), *on remand*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed at request of parties*, 469 U.S. 1200 (1985). The Court's later decision in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334-35 (1990) also precluded such standing. (Certain lesser matters were involved in petitioner's motion to dismiss.)

ethical issues promptly. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868 (1988). They appeared at the January 12 hearing without raising the matter; and they initiated assent to the judge's presiding. (App. 34a-35a.)

The actions taken by the district judge to obtain counsel's "waiver" violated, in several respects, the letter, spirit and substance of 28 U.S.C. §§ 455(a) and (e) and Canon 3 of the Code of Judicial Ethics, as adopted by the Judicial Conference ("the Code"). These provisions require that a judge *sua sponte* declare himself or herself disqualified in any circumstance that might reasonably give rise to an appearance of partiality. As protection against judicial pressure, they also require that any "waiver" or "remittal of disqualification" must come from the parties, not the lawyers -- after full disclosure; and Canon 3 recites that any remittal must occur outside the presence of the judge. The majority opinion below, however, expressed little concern with the statutory and code violations. Rather it questioned the need to comply with either § 455(e) or Canon 3(D) and held that the district judge's obtaining an invalid waiver had the perverse effect of shifting responsibility to the petitioner itself -- requiring petitioner to communicate any ethical misgivings to the judge, not with mere timeliness, but with "immediacy" (App. 31a.), and to act before petitioner had determined whether it had a well-grounded objection in the circumstances. On this basis, the majority held that petitioner forfeited any relief by mandamus. (App. 23a-24a, 30a-31a.)

The majority opinion turned the intended rules of disqualification upside down, based on the following

facts. After the January 12 conference, petitioner's Maine counsel telephoned petitioner's lead counsel, who in turn immediately telephoned petitioner. The responsible individual there, away and unreachable, returned the call on the afternoon of Friday, January 14, 1994, just before a three-day federal holiday weekend. That individual spoke with an associate of the law firm, who, in lead counsel's absence, urged a conference at the beginning of the week. (App. 98a.) The contemplated conversation took place on the next business day, Tuesday. (App. 95a.) On the next day, Wednesday, January 19, 1994, the district judge issued his decision. The majority opinion thus obligated petitioner to take action within a narrow window comprising one and a half business days.

Petitioner confronted a situation where the district judge had affirmed his impartiality, and its own local counsel had already committed itself and was no longer available to assist on this matter (App. 81a.); further, petitioner faced questions arising in the unfamiliar and sensitive area of judicial qualification, complicated by the misbegotten "waiver" of its local counsel, as well as the obligation imposed by Rule 11 of the Federal Rule of Civil Procedure. Petitioner utilized the short period before the court conference set for February 14, 1994 to assess the matter. Promptly, prior to the conference, petitioner sent a letter to the clerk, for information of the district judge, setting forth its position. (App. 80a.)

As a result, the district judge called for a response by plaintiffs (App. 79a.); he then changed his mind and directed the parties to file a formal motion and cancelled the conference. (App. 77a.) He also

issued a Notice to Counsel providing additional views on his Petruccelli relationship. (App. 74a.) On May 12, 1994, he denied Cargill's motion on the ground that no reasonable person would question his impartiality. (App. 55a.)

The majority opinion of the court of appeals devoted little attention to the actions of the judge, although it virtually conceded that his relationship with Mr. Petruccelli was disqualifying. (App. 22a-23a; see App. 39a, 47a-52a, Campbell, J., dissenting.) The majority then framed the question -- so as to invite an erosion of the statutory requirements -- as whether petitioner's local counsel had "effected a fully valid waiver." (App. 23a.) The majority avoided determining that matter as well; Judge Campbell, dissenting, found the alleged waiver obviously invalid. (App. 39a, 41a.) The majority instead relied upon the invalid waiver and the supposed "silence" of petitioner, for what it called a "substantial" period (App. 24a.), to find an "uncertainty" as to petitioner's right to relief. (App. 24a.) The majority found no "unclean hands" but speculated that the "waiver" and elapsed time were "suggestive" of petitioner's "plot to await the results of the judge's impending decision." (App. 29a.)

The majority opinion thus denied the writ; allowed the district judge to continue to sit; left unclear the application of § 455 and the Canons (App. 24a-26a.); ignored the requirements of § 455(e), Canon 3(D), and the procedures adopted by the Judicial Conference to insulate disqualification matters from judicial pressure and retaliation (App. 30a-31a.); and left the entire issue to be decided at the end of the case, on appeal -- after an antitrust trial that is to be

held under the cloud of maintaining in place a district judge who, concededly, should not sit. (App. 24a, 30a.) The opinion says nothing adverse about the apparent violations of statute by the judge or about the withholding of information by plaintiffs' counsel, but sets forth extensive, derisive commentary and speculation concerning the petitioner, which, significantly, violated no rule whatever.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. *The majority opinion undermines the statute and the Court's prior holdings, and it is in conflict in several respects with decisions of other courts of appeals.*

The decision below presents important and disturbing questions about the construction and application of several sections of 28 U.S.C. § 455. Subsection (a) provides that a judge may not sit "in any proceeding in which his impartiality might reasonably be questioned." Subsection (e), in conformity with Canon 3(D) of the Code, authorizes waivers -- limited to disqualifications based on subsection (a) -- by "parties," as distinct from "lawyers"; and like Canon 3(D), it requires full prior disclosure. Here, the majority opinion tolerates and prolongs a virtually conceded appearance of impropriety; and it compounds that statutory violation both by repeatedly giving effect to an invalid "waiver" (see, *e.g.*, App. 26a, 29a, and 31a.) and by proposing to give the invalid "waiver" determinative weight after trial. (App. 24a.) Further, through its substance, tone and plainly inaccurate

statements about the factual record,[6/] the decision below raises intimidating barriers that undermine the very objectives of the statute. The decision also confuses the responsible exercise of a court's mandamus authority with the different matter, addressed by the Court in *Liljeberg*, 486 U.S. at 859-60, of tailoring a remedy.

The majority opinion is unique in denying a writ of mandamus without actually deciding the judicial disqualification issues that are ripe, remitting them instead to an end-of-case appeal. This course is not a proper exercise of discretion; rather, it is irreconcilable with the view expressed by the Court in *Liljeberg*, 486 U.S. at 868, and by other courts, that matters of judicial disqualification must be resolved promptly. The strained course proposed by the majority opinion will result in demonstrable harm to the administration of justice (see, *infra*, at 24-28), and its practical effect, as Judge Campbell's dissent points out, is to deny relief entirely. (App. 47a.)

The decision is in conflict with those of other circuits. It conflicts with the Seventh Circuit's holding that matters of judicial disqualification must be raised by petition for mandamus and cannot be saved for appeal. *United States v. Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986). It conflicts with the Third Circuit's rule -- supported squarely by the legislative history -- that because of the

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6/ *See, e.g., supra*, n.4 and *infra*, nn.9 & 12. Notably, the majority opinion also accepts, uncritically, all of the district judge's recitals regarding his personal motives and undisclosed intentions, rather than assessing the appearances arising from the facts.

overriding importance of maintaining public confidence in the courts, consideration should not be given to contentions that a party acted with improper motive in seeking disqualification, *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 164 (3d Cir. 1993). In this respect the conflict is extreme inasmuch as the majority opinion is willing to deny a remedy based solely on a highly tenuous suggestion it divined from the record. Further, in giving legal recognition to the alleged "waiver," the decision is in conflict with § 455(e), Canon 3(D), and the Fifth Circuit's position in *Hall v. Small Business Admin.*, 695 F.2d 175, 180 n.3 (5th Cir. 1983), that the process of waiver must involve the parties directly, take place out of the presence of the judge, and be accomplished anonymously.

2. *There is no statutory basis for giving any legal effect to a "waiver" of disqualification that does not conform to § 455(e) and that follows the judge's failure to disqualify himself in violation of § 455(a).*

In order to illustrate how greatly the majority opinion deviates from applicable authority, it is necessary only to recite what should have happened here and why. Section 455(a) provides that a United States judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." He or she must avoid "even the appearance of partiality." *Liljeberg*, 486 U.S. at 861-62. The responsibility is automatic, mandatory and self-executing, and a judge's first requirement is to disqualify himself or herself *sua sponte*. *Alexander*, 10 F.3d at 162; App. 39a. "[I]f there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify

himself and let another judge preside over the case." H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 ("House Report"). Here, the trial judge was in plain violation of the statute as of the time that he entered into a disqualifying relationship with the Petruccelli firm, *Liljeberg*, 486 U.S. at 861 -- even if, as the trial judge has asserted, he was not "conscious[ly] aware[]" that the Petruccelli firm was appearing before him while he was considering that firm's submissions on the pending motion to dismiss. (App. 75a.) Concededly, he was aware of the conflict for some time before he disclosed it to petitioner. (*Id.*)

Section 455 was enacted in 1974 to conform to revised Canon 3, adopted in 1973. Its purposes were to codify the Code's requirements, to establish the "appearance of justice standard," and to overrule the "duty to sit." It was viewed as "virtually identical" to Canon 3(D). House Report, 1974 U.S.C.C.A.N. at 6355; *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1112 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). A central problem, addressed in the congressional testimony of former Chief Justice Roger Traynor of the California Superior Court, was that the risks perceived by counsel in confronting a judge on a matter of his or her impartiality had resulted in recurring, timorous conduct -- *i.e.*, lawyers were routinely giving "waivers."[7/]

7/ "Our principal problem was to minimize the chance that a party or counsel would feel under pressure to waive disqualification and to devise a procedure to that end . . . ." Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House of Representatives Comm. on the Judiciary, 93d Cong., 2d Sess. 8 (1994) (hereinafter

(continued...)

Congress was made aware that new Canon 3(D) required that any consideration of any waiver be "outside the presence of the judge"; that the party, not just its counsel, must provide any waiver; and that there must be full prior disclosure on the record. Accordingly, section 455(e) itself contemplates waiver only from "parties" after "full disclosure on the record." The issue has remained a concern, and subsequently the Judicial Conference adopted a procedure for parties to respond, anonymously, through the clerk of the court with regard to waiver. (App. 10a-11a.)

Here, in contrast, the district judge, as Judge Campbell's dissent correctly notes, did "exactly" what the statute and Canon 3 proscribed. (App. 40a-43a, 51a-52a.) To summarize: (1) The judge did not provide disclosure "at the earliest practicable time," *Hall*, 695 F.2d at 180 n.3, but waited until the Petruccelli firm had achieved a satisfactory result and he had paid his bill. (2) He did not disqualify himself, 28 U.S.C. § 455(a), and state that he would proceed no further in the absence of unanimous waivers; he noted only that it was "arguably" proper that he "disclose" the matter to "see if anyone ha[d] any objection," while expressing "moral[] certain[ty]" that he could continue (App. 35a.) -- a scenario explicitly discredited by the

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7/(...continued)
"Hearings") (statement of Hon. Roger J. Traynor). "[T]he lawyer who is going to appear before the same judge at another time in another case really has very little choice." Hearings at 13 (statement of John P. Frank). "Judge Biggs said . . . that in his circuit, they all were waiving . . . that is exactly . . . the trouble." Hearings at 20 (statement of Frank).

Judicial Conference.[8/] (3) The judge knew that petitioner's counsel could not possibly have consulted his client to obtain consent. (App. 40a.) (4) The "no objection" response was led by plaintiffs' counsel, who was ethically compromised by his own continuing non-disclosure of the relationship; and the district judge must have known that too. (5) Contrary to the requirements of Canon 3(D), nothing was done outside the presence of the judge. (6) Contrary to the requirements of § 455(e) and the Canon, the alleged waiver had not involved a "party." (7) Contrary to § 455(e), there was no "full disclosure . . . on the record," a requirement strictly construed. *See* 7 James W. Moore, Moore's Federal Practice ¶ 63.07 [2.-3] at 63-28 (2d ed. 1995).[9/] Little else is needed to imagine the pressure placed on counsel to "go along" and to endorse a judge's own declaration of certainty regarding

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8/ "The practice of advising counsel of a possible conflict, and asking counsel to indicate approval of the judge remaining in a particular case, is fraught with potential coercive elements which makes this practice undesirable." *Guide to Judiciary Policies and Procedures*, at I-21, ¶ 11.

9/ The district judge here made a conclusory disclosure, sufficient, perhaps, to explain why he should step down; but clearly insufficient to solicit a party's waiver. Even with two subsequent explanations (App. 56a-58a, 74a-76a.), the district judge never revealed the substance or dimension of his personal dispute; the identity of the other party; the nature of the result achieved by Mr. Petruccelli; or anything else that would allow a party, asked to consider waiver, to take measure of the judge's problem and thus the depth of his potential gratitude. Nevertheless, the majority opinion states that the judge disclosed "book and verse." (App. 24a.) Further, before obtaining the "waiver," the judge did not disclose either that he had actively worked on the pending motion to dismiss after he had retained Mr. Petruccelli or that he intended to issue his decision shortly.

his impartiality.

It bears emphasis that section 455(e), like the Canon on which it was based, does not contemplate a "waiver" from lawyers, but only from "parties." The terms "lawyer" and "party" are differentiated throughout § 455, reflecting the legislative history. The principal expert called by the House Judiciary Committee testified that the requirement that the party sign any waiver was imposed to give "maximum protection to the lawyer," because "it will never be known whether it was the lawyer or the party who drew the line," and that § 455 was designed to be "stricter" than the Canons with respect to waiver.[10/] Chief Justice Traynor's testimony before Congress made clear that Canon 3(D)'s requirement "that the parties . . . agree" was imposed specifically to provide lawyers "an avenue of escape," in order to blunt the "velvet blackjack" of "judicial pressure."[11/]

The position adopted below -- that an invalid waiver might instead blunt petitioner's right to relief -- is manifestly inconsistent with the statute. The opinion below conspicuously downplays the trial judge's disregard of the statute and repeatedly cites the "waiver" and the petitioner's supposed responsibility to act with immediacy as "tip[ping] the equitable balance" against mandamus. (App. 22a.) Reliance upon the invalid waiver pervades the opinion, *e.g.*: "[W]e think that local counsel's unqualified assent, combined with Cargill's

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10/ Hearings at 13 (statement of Frank).

11/ Hearings at 8 (statement of Traynor), and 30 (testimony of Traynor).

subsequent silence for a substantial period of time . . ." (App. 24a.); "While the record does not compel a finding that petitioner and its lead attorneys delayed any attempt to retract Maine counsel's waiver as part of a plot to await the results of the judge's impending decision, the chronology is suggestive" (App. 29a.); "[P]etitioner's course of conduct -- whether conniving or merely slipshod -- influences our assessment of the equities." (App. 31a.)

This approach cannot be squared with the statute or, for that matter, with the factual record. The statute and Canon 3 place responsibility squarely upon the judge. Congress anticipated that the very problems involved in this case could be avoided by the simple expedient of assignment to another judge. House Report, 1974 U.S.C.C.A.N. at 6357. If there is some special need for a particular judge to remain on the case, a need not evident here, the procedures for securing waiver are both clearly stated and easily satisfied; and there is not the slightest suggestion that they could not have been satisfied here. The Judicial Conference informed Congress that the waiver provisions were exclusive and rigorous. "[W]aiver (or remittal) should be permitted only in *specifically defined circumstances and under specified controls*." House Report, 1974 U.S.C.C.A.N. at 6361 (emphasis added).

Further, Congress underscored its intention that the focus remain on judicial compliance by ignoring the recommendation of the Department of Justice that the statute require that "applications for disqualification shall be timely made." House Report, 1974 U.S.C.C.A.N. at 6358. Indeed, Congress specifically addressed the question of possible improper motive by

counsel and stated that the issue had been addressed by requiring that the ground for disqualification "must have a *reasonable* basis." House Report, 1974 U.S.C.C.A.N. at 6355 (emphasis in original).

Against this background, it is clear that the majority's accusatory approach -- as contrasted with Judge Campbell's appraisal of the difficulties facing a litigant (App. 41a, 44a-45a.) -- does not provide the proper rule of decision in a case of this nature. The legislative history provides no basis for the majority opinion's shifting of responsibility (see App. 44a.), much less for it to deny relief on the basis of speculations regarding a party's not taking precipitate action.

Even assuming *arguendo* that it is appropriate to shift inquiry to the conduct of the prejudiced party -- an inquiry barred by the Third Circuit and apparently by the legislative history -- that course should be strictly limited to a situation where others were actually prejudiced, *cf. Liljeberg*, 486 U.S. at 868-69. That was certainly not the case here. The district judge, who was principally responsible for setting the course of events, was not drawn into wasted effort; his lengthy opinion on the motion to dismiss had been composed before disclosure of the Petruccelli relationship. Moreover, both the district judge and plaintiffs' law firm could have avoided the scenario resulting here simply by disclosing their relationship in mid-December. There is no warrant in either the statutory scheme, or in the instant facts, for the complete reversal of statutory responsibilities adopted in the majority's opinion.

3. *The court of appeals, by abdicating its mandamus powers, undermined the Court's objective that judicial disqualification issues must be resolved promptly.*

The court of appeals conceded that an issue of judicial disqualification presents a "sufficiently extraordinary situation" to justify use of its mandamus authority (App. 21a.), but found that there were two requirements -- a "clear entitlement to the requested relief and irreparable harm without it" and a "favorable balance of the equities" -- that precluded (App. 22a.) relief here. It held that the "clear entitlement" criterion was not met because of local counsel's "unequivocal waiver unprompted by the court"[12/] -- thus giving credit to the invalid "waiver" -- and petitioner's waiting until before the scheduled conference ("nearly a month") to set forth its objections. It declared that interval "suggestive" of improper motive. (App. 29a-30a.) On this basis, it declared that it "need go no further" (App. 32a.) -- remitting petitioner to "raise its claim of error, if it so chooses, in an end-of-case appeal." (App. 33a.)

This approach does not fairly take account of the factors bearing on whether to grant the writ; nor does it apply the stated factors correctly. The traditional purpose of the writ is precisely to "confine an inferior

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12/ The court of appeals' palliative statement that local counsel's waiver was "unprompted" is bewildering. The transcript is clear that the trial judge stated that it was "arguably" proper that he disclose the matter to "see if anyone has an objection." It was to this prompting that plaintiffs' counsel then responded, and -- with an additional mitigating interjection by the judge -- that petitioner's counsel responded. (App. 35a.)

court to a lawful exercise of its prescribed jurisdiction," *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978); *Kerr v. United States Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976), with the important qualification that the Court has not used a "narrow and technical understanding of what constitutes a matter of 'jurisdiction'," *id.* (citation omitted). Here, section 455(a) explicitly limits the authority of a judge to preside, and a district judge improperly continuing to sit does so beyond his "jurisdiction." *See Mallard v. United States Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 309 (1989).

It is important that petitioner here had "no alternative remedy available," *see Mallard*, 490 U.S. at 309 -- that is, no current avenue of relief to pursue. *See Heckler v. Ringer*, 466 U.S. 602, 616 (1984); *Kerr*, 426 U.S. at 396. The Court has long held that where judicial impartiality is at issue, "The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious. . . . [N]othing can be more elusive . . . than a disposition of a mind in which there is a personal ingredient." *Berger v. United States*, 255 U.S. 22, 36 (1921).

It is immaterial whether the claim is one of actual bias or one based on objective appearances. Contrary to what the court of appeals apparently believed (App. 31a.), the concern over the existence of facts that would lead a reasonable person to question a judge's impartiality is not an abstraction, but rather gives effect to widespread beliefs about human nature. The official reporter for the Code cited Justice Frankfurter on the point that, "reason cannot control

the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate . . . or . . . lead others to believe they are operating, judges recuse themselves. . . . [T]he administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466-67 (1952), quoted in E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* at 62 (1973).

Moreover, an end-of-case appeal provides a completely inadequate remedy for the interim harm that would be caused by public perception of a court's entrenching, for the duration of the case, a judge that clearly should not sit. It is this very concern for "our institutional credibility" (App. 42a.) that was the reason for the statute's adoption of the "appearance of injustice" standard and the removal of the "duty to sit." House Report, 1974 U.S.C.C.A.N. at 6355.

Further, the point is made in Judge Campbell's dissent that the majority's "suggestion that this issue may be revisited several years down the road on direct appeal" cannot be taken "seriously" (App. 47a.), particularly given the rules for relief set out in *Liljeberg*, 486 U.S. at 864. "By then there would be overwhelming equities in plaintiffs' favor *not* to require them to undergo the expense and burden of retrying the case . . . ." (App. 47a.) Here, petitioner sought relief at a preliminary stage of the case when, as the Court said in *Berger*, 255 U.S. at 35, "there is no serious detriment to the administration of justice nor inconvenience worth of mention, for of what concern is it to a judge to preside in a particular case [or] . . . to other parties to have him so preside, and any serious delay of trial is avoided. . . ."

On the other hand, the concerns articulated by the court of appeals are misconceived. The requirement that a mandamus petitioner show that its right is "clear and indisputable" does not mean that the matter must be devoid of any possibility of debate, or that the court of appeals can avoid its responsibility to address matters ripe for decision. Rather, the "clear and indisputable" requirement has been used to characterize far different situations -- such as where injuries claimed were themselves "hypothetical," and the case additionally required consideration of a series of complicated legal questions, *Whitehouse v. Illinois Cent. R.R. Co.*, 349 U.S. 366, 372-73 (1955); where the very relief sought was inequitable and would have required the resolution of several "doubtful" questions in petitioner's favor, *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 357, 360 (1933); where there was "no clear duty" for the respondent to act; or where the resolution of the matter required resort to other, independent proceedings. *See United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540, 542-43 (1937); *see also Pittston Coal Group v. Sebben*, 488 U.S. 105, 121-22 (1988); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam).

Here, in contrast, there is a clear duty of the district judge not to sit once § 455(a) is implicated. *Liljeberg*, 486 U.S. at 860-61. The court of appeals did not assert that there were complicated questions here that needed to be developed in other proceedings or that would be more clearly resolvable on direct appeal. Nor is there any threat of piecemeal litigation of issues that are actually part of the merits of the case. There is simply no benefit in deferring the matter for rebriefing and reargument on appeal, but only duplication, waste

and certain injury to the public's perception of judicial integrity.

Equally misplaced is the majority's reliance on "principles of equity" which would deny a writ of mandamus to a party that does not come into court with "clean hands." The majority opinion relied upon *United States ex rel. Turner v. Fisher*, 222 U.S. 204, 209 (1911) (App. 28a.), and cited again the alleged "waiver" and petitioner's alleged inaction. (App. 30a-31a.) However, the reasons which would weigh against a grant of the writ because of "unclean hands" have a gravity that bears no relation to the instant facts. For example, *Fisher* involved perjury -- "fraud, thus admitted." 222 U.S. at 209. Similarly, *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 815-19 (1945), involved petitioner's perjury. In fact, it is doubtful that *any* weight may be afforded to the factors on which the majority relied, inasmuch as the "waiver" clearly violated the statute, and Congress declined to incorporate a timeliness requirement in § 455. House Report, 1974 U.S.C.C.A.N. at 6358. Indeed, if any "delay" had consequence here, in view of the statutory objectives, it was that of the district judge and plaintiffs in failing to disclose their relationship in mid-December, thus creating the very time pressures upon which the majority opinion relies.

Similarly, lower court cases cited in the majority opinion -- where events intervening between the disqualifying act and a litigant's objection were given consideration -- have no imaginable semblance to the instant facts. *See, e.g., In re Allied-Signal, Inc.*, 891 F.2d 967, 971-72 (1st Cir. 1989) (Breyer, J.) (objections came 2 years after facts became known in a highly developed

and complex case, and the alleged conflict was "weak and remote"); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312-16 (2d Cir. 1988) (no substantive basis for disqualification; over a year of pretrial proceedings had already resulted in 3 judicial opinions and 36 orders), *cert. denied*, 490 U.S. 1102 (1989); *In re United Shoe Mach. Corp.*, 276 F.2d 77, 79 (1st Cir. 1960) (petitioner "knew of [disqualifying] circumstances for two and a half years and said nothing"); *Reilly v. United States*, 863 F.2d 149, 160 (1st Cir. 1988) (first objection made 7 months after the event and after trial on the merits had occurred). The Petition for Writ of Mandamus cited 10 cases on this point, Petition for Writ of Mandamus at 31 n.19, *In re Cargill, Inc.*, Docket No. 94-8042 (1st Cir. filed July 5, 1994); all demonstrate that lower court cases concerned with a party's alleged "lying in wait" before raising an objection, involved delays of many months or years, or until final judgment had been rendered following trial, or both.

4. *Issues of the timing of an objection may affect the nature of relief, but do not permit the perpetuation of a violation of § 455 or damage to the administration of justice.*

The majority's espousal of a rule of adjudication that postpones substantive consideration to the end of the case also confuses two different matters, *viz:* (1) the importance of exercising mandamus jurisdiction so as promptly to resolve disqualification issues, and (2) the framing of appropriate relief. Even assuming *arguendo* that the court of appeals could give affirmative weight to factors that are in conflict with the statute, it erred in failing to recognize that factors involving the timing of disclosures by the district judge, or of objections by the

parties, would go only to the manner of framing appropriate, prompt relief. *Liljeberg*, 486 U.S. at 864, 867-69; *In re School Asbestos Litig.*, 977 F.2d 764, 785-87 (3d Cir. 1992); *In re Allied-Signal*, 891 F.2d 974, 975-76 (1st Cir. 1989) (Breyer, J.).

The *Liljeberg* decision requires that a court consider such matters in assessing the relative justice of possible remedies and the "risk of undermining the public's confidence in the judicial process." 486 U.S. at 864. Applying the principles of *Liljeberg* here, the district judge's apparent failure to deal properly with his ethical responsibilities set the very framework for subsequent events; these actions can hardly generate favorable equities. Much the same can be said of plaintiffs' counsel's withholding disclosure of the relationship for weeks, and then leading the process of the so-called "waiver." Petitioner was, in contrast, unprepared for the January 12 conference and yet was called upon by the majority opinion to act with uncommon speed and to put itself at risk while ill-informed as to its legal rights. Once informed, petitioner acted responsibly. The fact that the district judge had decided the motion to dismiss carries little weight here; both jury and non-jury verdicts have been upset in order to vindicate § 455(a). Little had occurred in this case. Yet, to allow the judge to preside throughout the trial while apparently partial to one side -- and after violating applicable procedures -- is obviously wasteful and damaging to public perception of the integrity of the judicial system. *See United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

The course set by the opinion below could hardly be more awkward. Further proceedings in this case can proceed only with the threat of a disqualification "time bomb" that may upset any judgment. The judge will expend his own time in this uncertain endeavor while remaining under a cloud. Petitioner will be forced to try a significant case under a substantive ruling that is manifestly erroneous and has an apparently improper origin, only to reargue the disqualification matter on appeal, with delay and duplication. On the other hand, Judge Campbell's observation that there is no realistic prospect of the matter being considered on end-of-case appeal suggests that the denial of mandamus here comprises an effective denial of due process.

Further, the implicit message and tone of the majority's opinion are inappropriate. This case involved solely an application to decide an important issue of judicial disqualification at an early stage. The writ will not serve as a "weapon" (App. 28a.), and can hardly serve in a plausible story-line of a "plot," (App. 29a.) -- particularly since the key operative circumstances were generated by the district judge himself. There is a gross anomaly in urging that a litigant state its grievance for disqualification promptly and in stressing the societal imperative of an impartial judiciary, on one hand; and then, out of alleged concern that litigants may use such petitions for "strategic value" -- a concern that is refuted by available statistics -- in condoning and perpetuating an ostensible appearance of impropriety, on the other hand, all on the strength of a mere "suggestion" of "gamesmanship." (App. 32a.)

Ultimately, the majority opinion concedes that it would require that petitioner communicate its

misgivings and "run the risk" of offending the judge (App. 31a n.9.), *not* in seeking recusal, but *in advance* of it. Consequently, even if petitioner were later to determine that a request for recusal was not well grounded, petitioner would already have revealed itself as uncomfortable with the judge's integrity. The majority thus forces a litigant to borrow the very trouble sought to be avoided by § 455(e), before making any recusal request. Even if the request were not later made, the damage would already have been done.

The systemic implications are equally harmful. The majority holds that an appellate court should refuse to decide substantive issues under § 455 at an early stage of the case if the matter is, in any material respect, less than "clear cut." To this end, "suggestive" speculations on the party's motivations are sufficient to deny relief. Yet a litigant that has a legitimate, but in some respect uncertain, claim for disqualification *must* raise it with the district court judge promptly or risk "waiving" it. The district court judge, however, would understand that any doubt in the claim will insulate from immediate appellate review his or her refusal to recuse. Particularly in the overwhelming majority of federal court cases that do *not* go to trial -- about 93% -- the practical result is not only to defeat that claim but also to place the complainant in a damaged position for the duration of the case. Such a litigant risks retribution; and its fear that the judge may be partial will undoubtedly affect its own assessment of the case, including its settlement value. The ultimate consequence is that litigants will apprehend that they should not raise disqualification matters at all, unless they are devoid of doubt.

5. *The opinion conflicts with the holding in Liljeberg on matters of remedy.*

Even assuming *arguendo* that the petitioner was "untimely" in relation to the district judge's decision on the motion to dismiss, it was certainly timely, under any articulated standard, in relation to the judge's sitting for the remainder of a case that had only just begun. Thus, the district judge should have recused himself from further proceedings.

Turning to the impact of the Petruccelli relationship on the judge's decision on the motion to dismiss, that matter should have been governed by the factors outlined in *Liljeberg*, 486 U.S. at 867-69, which involve comparing the equities and injustices of various courses of action. Here, no party will be injured by review by an unquestionably impartial judge. The cost -- review of a question of law on a motion to dismiss -- is insubstantial. Further, the Court in *Liljeberg* gave regard to the apparent merit of the substantive decision rendered. *Id.* at 868-69. Here, such a review suggests that the decision granting antitrust standing was plainly in error. The ultimate question is therefore whether a new judge should be required to adopt an opinion that appears both erroneous and possibly tainted. Such a result is not appropriate.

6. *The issues presented are of great importance to the administration of justice and present a special need for uniformity of treatment.*

The Court's concern for the appearance of, and not just the actuality of, judicial integrity is of the highest level of importance and "has constitutional

dimensions." *Liljeberg*, 486 U.S. at 864 n.12. Due process requires that the judge be beyond any reasonable question, based on objective appearances, that he or she cannot "hold the balance nice, clear and true." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. at 825.[13/] Further, there is an obvious need for uniformity in both ethical standards and the procedures designed to implement those standards.

The issues presented by the instant petition -- the responsibility of a judge to recognize a conflict and to deal with it promptly; the requirement to follow conscientiously the requirements as to waiver; and the proper manner of appellate resolution of substantial issues of judicial disqualification that cloud the conduct of a case -- are fundamental and of essential concern. There is little authoritative guidance available and a lack of uniformity.

The issues themselves gain special importance by reason of the overarching concern that the public perceive the judicial system as maintaining the highest standards of fairness and integrity. *See Murphy*, 768 F.2d at 1539. Because the opinion below sets a decidedly wrong, and potentially influential, course in this very important area, the Court should grant a writ of certiorari to review it.

13/ The real, and reasonable, concern of petitioner was and remains that a large corporation, facing a jury trial in a community where it has few roots, involving the sensitive issue of employee firing, had particular need of a forum that would hold the balance "nice, clear and true." *Id.*

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

IN RE CARGILL, INCORPORATED,
Petitioner,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

APPENDIX

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105pp

INDEX TO APPENDIX

STATUTES AND CANONS INVOLVED 1a

FORM OF NOTICE CONCERNING WAIVER OF JUDICIAL DISQUALIFICATION 10a

ORDER OF THE COURT OF APPEALS ON PETITION FOR REHEARING 12a

OPINION OF THE COURT OF APPEALS ON PETITION FOR WRIT OF MANDAMUS 14a

- Appendix to Opinion (Transcript of Chamber Conference, January 12, 1994) 34a

- Dissenting Opinion 38a

MEMORANDUM OF DECISION AND ORDER OF THE DISTRICT COURT 55a

NOTICE TO COUNSEL 74a

SCHEDULING ORDER #2 . . . . . 77a

SCHEDULING ORDER 79a

LETTER FROM COUNSEL TO THE DEPUTY CLERK OF THE DISTRICT COURT 80a

AFFIDAVITS 94a

STATUTES AND CANONS INVOLVED

28 U.S.C. § 455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject

matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for disqualification.

* * *

28 U.S.C. § 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

* * *

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY

• • • •

C. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness;

(c) the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either the third degree of relationship, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(e) the judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge, spouse or

minor child, as the case may be, divests himself or herself of the interest that provides the grounds for disqualification.

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1), except in the circumstances specifically set out in subsections (a) through (e), may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If the parties and their lawyers after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

As approved by the Judicial Conference, Sept. 22, 1992, reprinted in Guide to Judiciary Policies and Procedures, Vol. II, Codes of Conduct for Judges and Judicial Employees, Nov. 1993, at I-10 - I-12.

[FORM OF]
NOTICE CONCERNING WAIVER OF JUDICIAL DISQUALIFICATION

FROM: The Clerk Date _____

TO: XXXX (Counsel) XXXX (Counsel)
XXXX

RE: ABC v. DEF, Case No. _____

Canon 3D of the Code of Conduct provides (with exceptions not pertinent to this case) that when a judge is disqualified in a proceeding because "the judge's impartiality might reasonably be questioned", the judge may participate in the proceeding if all the parties and lawyers, after notice of the basis for the disqualification, agree in writing to waive the disqualification under a procedure independent of the judge's participation.

Unless a waiver is obtained from all parties and all counsel, Judge _____ intends to disqualify in this proceeding because of these circumstances:

If you and your client(s) wish to waive the Judge's disqualification, letters to that effect from you and from your client(s) must be sent to me within ____ days of the date of this Notice. The letters should not be sent to the Judge and copies should not be sent to other counsel. If all parties and all counsel submit such letters, this Notice and all responses will be made part of the record, as required by Canon 3D, and the Judge will continue

participation in the proceeding. If a waiver is not received from all parties and all counsel, this Notice and any responses will be kept under seal by the Clerk and not shown to the Judge, nor will the Judge be informed of the identity of any party or lawyer who declined to waive the disqualification. If the disqualification is not waived, the case will be reassigned to another Judge.

As approved by the Judicial Conference, Sept. 22, 1992, reprinted in Guide to Judiciary Policies and Procedures, Vol. II, Codes of Conduct for Judges and Judicial Employees, Nov. 1993, at I-21 - I-22.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-8042 IN RE:

CARGILL, INC.,
Petitioner.

BEFORE

Torruella*, Chief Judge;
Selya, Cyr, Boudin, Stahl*, & Lynch*, Circuit Judges

ORDER OF THE COURT

Entered: November 16, 1995

This case came on to be submitted on a petition for rehearing or for rehearing en banc.

The Court being divided 3-3 upon en banc reconsideration, It is now here ordered, adjudged and decreed as follows:

The Writ of Mandamus is denied in accordance with this Court's Opinion.

By The Court

FRANCIS P. SCIGLIANO, Clerk

By: JANICE M O'NEIL
Chief Deputy Clerk

cc: Messrs. DeTroy, Wruble & Bates

* Chief Judge Torruella, Judge Stahl and Judge Lynch, dissenting votes.

United States Court of Appeals
For the First Circuit

No. 94-8042

IN RE
CARGILL, INC.,

Petitioner.

ON PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MAINE

Before

Selya, Circuit Judge,
Campbell, Senior Circuit Judge,
and Boudin, Circuit Judge.

Bernhardt K. Wruble, with whom William R. Sherman, Verner, Liipfert, Bernhard, McPherson and Hand, Peter J. DeTroy, III and Norman, Hanson & DeTroy were on brief, for petitioner.

Joel C. Martin, with whom Michael K. Martin, Daniel W. Bates and Petruccelli & Martin were on brief, for plaintiffs.

October 10, 1995

SELYA, Circuit Judge. Petitioner, Cargill, Inc. (Cargill), seeks a writ of mandamus directing a judge of the United States District Court for the District of Maine to withdraw a decision previously issued and then to recuse himself from further proceedings in the underlying cause.[1/] For the reasons that follow, we decline to issue a prerogative writ.

I. BACKGROUND

The petition arises out of a civil action brought by several former Cargill employees, represented by Daniel W. Bates and Kenneth D. Keating of Petruccelli & Martin (P&M), an eight-lawyer firm in Portland, Maine. The complaint invokes the Robinson-Patman Act, 15 U.S.C. §§ 13-13b (1988), and alleges in substance that Cargill discharged the plaintiffs in retaliation for their unwillingness to abide certain predatory pricing practices. Cargill retained a Washington-based firm, Verner, Liipfert, Bernhard, McPherson, and Hand (Verner, Liipfert), as lead counsel, and a Portland firm, Pierce, Atwood, Scribner, Allen, Smith, and Lancaster (Pierce, Atwood), as local counsel. It then moved to dismiss on

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1/ Petitioner premises his argument on the ground that the judge's impartiality might reasonably be questioned. The relevant statute provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28. U.S.C. § 455(a) (1988).

the basis that the plaintiffs experienced no antitrust injury and, therefore, lacked standing to maintain the action.

On December 19, 1993, while Cargill's motion was pending before him, the district judge to whom the case had been randomly assigned became embroiled in what he subsequently described as a "minor controversy" relating to his efforts, and those of his wife, to purchase a new home. The judge telephoned Gerald Petruccelli, a principal partner in P&M, and sought his advice anent the real estate dispute. Petruccelli agreed to the proposed representation, telling the judge that he (Petruccelli) knew of "no impediment" to the relationship.

On December 21, the two men met for about 50 minutes and discussed the judge's real estate problem. A series of telephone conversations followed over the course of the next eight days. None lasted more than five minutes. Petruccelli dealt directly with the lawyer who represented the other side in the real estate matter and, on January 6, 1994, he resolved the imbroglio to the judge's satisfaction. Petruccelli rendered a bill, dated January 7, based on his standard hourly rate. The judge paid the invoice within the week. It is undisputed that Petruccelli never represented the judge in any other matter and that the judge dealt only with Petruccelli (not with any other P&M attorney).

The judge maintains that, at the time he engaged counsel, he had "no conscious awareness that Mr. Petruccelli or his firm were involved in this specific

litigation then pending" before him.[2/] Nonetheless, a few days after he had retained Petruccelli, the judge asked his docket clerk to check his calendar for pending cases in which P&M might have appeared. The clerk brought two such cases to the judge's attention at about the time that the attorney-client relationship ended. One of these was the case against Cargill. Although Petruccelli himself had played no role in P&M's representation of the plaintiffs, the judge decided that he had best disclose his dealings with Petruccelli.

On January 11, the clerk, acting at the judge's direction, notified local counsel to attend a conference on the following day. The disclosure conference (a transcript of which comprises the appendix) proved to be brief. Attorneys Bates and Keating appeared for the plaintiffs, and Attorneys O'Leary and Einsiedler (both of Pierce, Atwood) appeared for Cargill. When advised of the attorney-client relationship between Petruccelli and the judge, both Bates and O'Leary quickly volunteered that their respective clients had no objection to the judge's continued participation in the case. The judge then advised the lawyers that he was grappling with Cargill's motion to dismiss which, in his view, "raise[d] some very interesting and difficult questions." He forecast that he would hand down a decision "within a week or so."

2/ This declaration, and other declarations reflecting the judge's state of mind, are extracted from the record of a conference held in this case (reprinted in the appendix), from the judge's notice to counsel (described infra), and from the order denying Cargill's recusal motion. For the most part, petitioner has not challenged the factual accuracy of the judge's statements.

Precisely one week thereafter, the judge issued a 39-page rescript denying Cargill's motion to dismiss. While the judge closed his chambers and released his staff on holiday leave from December 24, 1993 through January 3, 1994, he admittedly labored over the matter during some portion of the period when Petruccelli represented him.

The filing of the opinion elicited no immediate response. Several weeks later, however, Bernhardt Wruble, a Verner, Liipfert partner, wrote a letter to the court asserting that, because "a judge's contemporaneous representation by opposing counsel is uniformly regarded as a basis for obligatory disqualification," the judge should withdraw his order denying the motion to dismiss, relieve himself of all responsibility for the case, and reassign it to another jurist. Anticipating the predictable reaction to this demand, Wruble suggested that Pierce, Atwood's acquiescence was of no moment. Since local counsel lacked prior notice of the purpose of the January 12 conference and, hence, had no opportunity to consult in advance with either the client or lead counsel, Wruble wrote, the judge had not afforded petitioner "adequate time for a considered response" to the disclosure. Thus, there could be no "effective" waiver.

The judge did no fewer than three things upon receiving Wruble's communique. First, he postponed a scheduled status conference in the case. Second, he directed any party who sought his recusal to file a formal motion to that effect. Third, he composed and served a statement, denominated as a notice to counsel, in which he

denied "that the Court required a decision on waiver of any objection to the Court's continued participation to be made at the conference." The judge explained that he meant the disclosure conference to be informational in nature, that is, "to advise counsel of the circumstances of Mr. Petruccelli's representation and afford counsel an opportunity to confer with clients and other counsel to decide whether they wanted to move for recusal or request other action by the court." But, wrote the judge, though he intended to give counsel a full month in which to advise him of their clients' positions with respect to the disclosed matter -- and, with this in mind, thought it sensible to summon only local counsel to the disclosure conference -- he did not do so because, immediately following his revelation, both counsel, acting for their respective clients, spontaneously disclaimed any objection to his continued participation in the case.

On February 25, 1994, Cargill asked the district court to certify for interlocutory appeal the January 19 order denying the motion to dismiss. See 28 U.S.C. § 1292(b) (1988).[3/] Roughly two weeks later, Cargill moved for recusal, proffering several affidavits. Cargill's motion, like Wruble's letter of February 13, made it clear that Cargill's position rested on a supposed appearance of impropriety, that is, the existence of circumstances in which Cargill believed that the judge's impartiality might reasonably be questioned. See 28 U.S.C. § 455(a), quoted supra note 1. Cargill did not advance, then or now, any

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3/ The district court eventually denied this motion. Petitioner does not assign error to the denial, nor could it rewardingly do so.

claim of actual bias. The plaintiffs opposed the recusal motion. In their opposition, they made two principal arguments: (1) Petruccelli's representation did not create an appearance of impropriety within the meaning of 28 U.S.C. § 455(a), and, in any event, (2) Cargill had waived any objection to the judge's continuing role in the case. The plaintiffs hinged the latter contention on 28 U.S.C. § 455(e), a statute that specifically permits a judge to accept the parties' waiver of a section 455(a) appearance-of-impropriety ground for disqualification as long as the waiver "is preceded by a full disclosure on the record of the basis for disqualification."

On May 12, 1994, the district court denied the recusal motion. Cargill subsequently filed its mandamus petition in this court. We invited the plaintiffs to respond, set a briefing schedule, and entertained oral argument.

II. THE NATURE OF MANDAMUS

Federal appellate courts are empowered to issue prerogative writs that are "necessary or appropriate in aid of their respective jurisdictions" under the All Writs Act, 28 U.S.C. § 1651(a) (1988). Because such writs disrupt the mechanics of the judicial system -- by accelerating appellate intervention, prerogative writs foster piecemeal review and disturb the historic relationship between trial and appellate courts -- they should "be used stintingly and brought to bear only in extraordinary situations." Doughty v. Underwriters at Lloyd's, London, 6 F.3d 856, 865 (1st Cir. 1993). Mandamus is such a writ. It is strong

medicine, and should neither be prescribed casually nor dispensed freely.

Consistent with these principles, the standards for issuance of the writ are high. A petitioner seeking mandamus must show both that there is a clear entitlement to the relief requested, and that irreparable harm will likely occur if the writ is withheld. See United States v. Horn, 29 F.3d 754, 769 (1st Cir. 1994); Doughty, 6 F.3d at 866; In re Pearson, 990 F.2d 653, 657 & n.4 (1st Cir. 1993). Sometimes, even these specific showings are not enough to justify a court's use of its mandamus power. In the final analysis, a writ of mandamus is an exceptional remedy and "is to be granted only in the exercise of sound discretion." Whitehouse v. Illinois Cent. R. Co., 349 U.S. 366, 373 (1955). In this context, equity informs the court's discretion. See Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976); United States v. Helvering, 301 U.S. 540, 543 (1937); United States v. Dern, 289 U.S. 352, 359 (1933); Doughty, 6 F.3d at 866; United States v. Patterson, 882 F.2d 595, 600 (1st Cir. 1989), cert. denied, 493 U.S. 1027 (1990); In re First Fed. Sav. & Loan Ass'n, 860 F.2d 135, 139-40 (4th Cir. 1988); Vishnevsky v. United States, 581 F.2d 1249, 1255 (7th Cir. 1978).

We have held that, in an appropriate case, an issue of judicial disqualification may present a sufficiently extraordinary situation to justify the unsheathing of our mandamus power. See In re Allied-Signal, Inc., 891 F.2d 967, 969 (1st Cir. 1989), cert. denied, 495 U.S. 957 (1990); In re Cooper, 821 F.2d 833, 834 (1st Cir. 1987);

In re United States, 666 F.2d 690, 694 (1st Cir. 1981); see also In re International Business Mach. Corp., 618 F.2d 923, 927 (2d Cir. 1980). However, the usual prerequisites to mandamus relief -- a showing of both clear entitlement to the requested relief and irreparable harm without it, accompanied by a favorable balance of the equities -- do not vanish merely because judicial disqualification is the business of the day. See, e.g., Allied-Signal, 891 F.2d at 969; Cooper, 821 F.2d at 834; In re United States, 666 F.2d at 694. In other words, the mere fact that a petition for mandamus is directed at securing the trial judge's removal does not ensure that the higher court will entertain the petition.

III. DISCUSSION

After careful perscrutation of the record, we conclude that petitioner's quest for mandamus should go unrequited. Cargill has shown neither that it is clearly and indisputably entitled to the writ nor that it faces an intolerable risk of irreparable harm should it be forced to await appellate review in the ordinary course. Moreover, Cargill's failure to take timely action, after learning of the judge's disclosure and Maine counsel's ensuing waiver of objection, tips the equitable balance and argues persuasively against issuance of the writ.

A

We turn first to the matter of entitlement to the relief requested. Assuming, arguendo, that the judge's relationship with Petruccelli created an appearance of

impropriety adequate to animate section 455(a) -- and we think that it probably did[4/] -- Cargill's entitlement to an order of disqualification remains questionable. Regardless of whether the actions of its local counsel effected a fully valid waiver of the disqualifying circumstance, the silence of Cargill and its lead counsel after learning what had transpired may very well have added the missing element, ratified the waiver, and given it life. We elucidate below.

The relevant statute, 28 U.S.C. § 455(e), plainly contemplates that a party may waive an appearance-of-impropriety ground for disqualification. The statute itself does not define the form or prerequisites of such a waiver; it only imposes the condition that the waiver be "preceded by a full disclosure on the record of the basis for disqualification." 28 U.S.C. § 455(e). The transcript of

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4/ The disqualification requirement of section 455(a) is triggered, despite the lack of any actual bias on the judge's part, if a reasonable person, knowing all the circumstances, would question the judge's impartiality. See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 861-62 (1988). Most observers would agree that a judge should not hear a case argued by an attorney who, at the same time, is representing the judge in a personal matter. See 13A Charles Wright & Arthur Miller, Federal Practice and Procedure § 1349, at 614 (1984) (citing cases). Although the appearance of partiality is attenuated when the lawyer appearing before the judge is a member of the same law firm as the judge's personal counsel, but not the same individual, many of the same cautionary factors are still in play. See, e.g., 2 Administrative Office of the U.S. Courts, Guide to Judiciary Policies and Procedures V-32 (1995) (expressing the view that "where an attorney-client relationship exists between the judge and the lawyer whose law firm appears in the case, the judge should recuse absent remittal"). This principle would seem to have particular force where, as here, the law firm is small and the judge's lawyer is a name partner.

the January 12 conference leaves no doubt that such a disclosure occurred. The judge laid out the nature of his relationship with Petruccelli, citing book and verse. This disclosure was then followed by an unequivocal statement on the part of Cargill's counsel, unprompted by the court, to the effect that Cargill did not object to the judge's continued service in the case. Local counsel reported these developments to lead counsel immediately after the conference ended, and Verner, Liipfert in turn promptly informed the client. Yet, for nearly a month thereafter, Cargill failed to express any discomfiture with the waiver.

Although we leave the ultimate question open for resolution on an end-of-case appeal, we think that local counsel's unqualified assent, combined with Cargill's subsequent silence for a substantial period of time, creates a sturdy foundation on which the validity of the waiver might rest, and that the resultant uncertainty undercuts Cargill's claim that it is plainly entitled to the requested relief. After all, it is common ground that civil litigants ordinarily are bound by their attorneys' tactical judgments, see, e.g., Brody v. President & Fellows of Harvard Coll., 664 F.2d 10, 12 (1st Cir. 1981) (holding, on particular facts, that client would not be allowed "to second guess his attorney's waiver"), cert. denied, 455 U.S. 1027 (1982), and waivers based on silence are standard fare, see, e.g., United States v. Nobel, 696 F.2d 231, 237 (3d Cir. 1982) (finding waiver under § 455(e) based on party's failure to make a timely objection once the basis for disqualification was fully disclosed), cert. denied, 462 U.S. 1118 (1983).

However, Cargill asseverates that no valid waiver could be given by its Maine counsel because the judge failed to follow exactly the procedures governing waivers of disqualification dictated by the Code of Conduct for United States Judges (CCUSJ), adopted by the Judicial Conference of the United States following promulgation by the American Bar Association. See CCUSJ, reprinted in 150 F.R.D. 307 (1992). Canon 3D of the CCUSJ allows a judge to hear a case if the parties and their lawyers agree to the judge's continued service not only after disclosure of certain bases for disqualification (including appearance of impropriety), but also after having been afforded "an opportunity to confer outside the presence of the judge[.]" Id. at 313. Here, what transpired at the disclosure conference met the first requirement of Canon 3D, but not the second.

However, even if we assume arguendo that this noncompliance rendered the original waiver ineffective,[5/]

5/ Although we need not decide the point, we doubt that every instance of noncompliance with the CCUSJ automatically justifies post-hoc invalidation of a waiver that otherwise meets the test of section 455(e). Certainly, the case law on the point is less than transpicuously clear. See, e.g., Nobel, 696 F.2d at 237 (explaining that "it is sufficient under [section 455(e)] if the judge provides full disclosure of his or her relationship at a time early enough to form the basis of a timely motion at or before trial and under circumstances which avoid any subtle coercion"); Haire v. Cook, 229 S.E.2d 436, 438-39 (Ga. 1976) (similar; construing Georgia law); Commonwealth v. Carney, 329 N.E.2d 778, 781 (Mass. 1975) (Goodman, J., concuring) (similar; construing Massachusetts law). Notwithstanding the importance we attach to the CCUSJ and the obvious desirability of assuring judicial compliance with the canons,

(continued...)

counsel thereafter had ample opportunity for consultation with the client, outside the presence of the judge, yet Cargill, knowing of the stated waiver, did not alter its position. When the judge's departure from the CCUSJ is weighed in the balance along with his explanation and Cargill's knowing acquiescence in local counsel's express waiver, the call seems to us to be quite close. This closeness sets a chain reaction in motion. It leads us first to conclude that the contested waiver may well be enforceable, and constitutes, at the least, a potential stumbling block on the road to recusal. The first conclusion leads inexorably to a second conclusion: that petitioner has failed in its endeavor to demonstrate that it is "clearly and indisputably" entitled to the relief that it seeks.

To be sure, Cargill has attempted to explain away its apparent ratification of the position taken by its local counsel both factually (through a series of affidavits) and legally (through its insistence on literal compliance with Canon 3D). Its factual explanations and legal theories may or may not hold water in the long run, but that is scarcely the point. We need not -- and do not -- decide the merits of the waiver question at this juncture. It suffices for present purposes merely to note that the issue is sufficiently clouded that petitioner's eventual entitlement to the requested redress -- the district judge's recusal -- is

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5/(...continued)
we think a strong argument can be made that not all instances of noncompliance with the CCUSJ are automatic disqualifiers.

problematic.[6/] See Pearson, 990 F.2d at 656 & n.4; Cooper, 821 F.2d at 834.

B

Petitioner suggests that recusal of a judge presents a special circumstance which, even in the absence of clear entitlement to the requested relief, warrants interlocutory review by way of mandamus. This suggestion is not without force.[7/] In cases in which parties have sought recusal based on assertions of actual bias, we have stated that "the issue of judicial disqualification presents an extraordinary situation suitable for the exercise of our mandamus jurisdiction." In re United States, 666 F.2d at 694.

6/ Because we find no clear and indisputable entitlement to the requested relief, we need not consider whether Cargill satisfied the second prong of the mandamus test by a showing of irreparable harm. We note, however, that although there is always some harm in litigating for nought, that harm repeatedly has been held insufficient, in itself, to justify mandamus relief. See, e.g., In re Bushkin Assocs., 864 F.2d 241, 243-44 (1st Cir. 1989).

7/ In the same vein, however, we can envision cases in which, despite a showing that ordinarily would amount to clear entitlement, a litigant has acted so deplorably that the petitioned court might choose to withhold discretionary relief. See generally Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814 (1945) (explaining that the doctrine of unclean hands "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief"); Texaco Puerto Rico, Inc. v. Department of Consumer Affairs, 60 F.3d 867, 880 (1st Cir. 1995) ("It is old hat that a court called upon to do equity should always consider whether the petitioning party has acted in bad faith or with unclean hands.").

Our rationale in these cases has been that "[p]ublic confidence in the courts may require that such a question be disposed of at the earliest possible opportunity." In re Union Leader Corp., 292 F.2d 381, 384 (1st Cir.), cert. denied, 368 U.S. 927 (1961). However, we have cautioned that this philosophy does not "commit us to entertaining every rejected affidavit of prejudice," and we have made it clear that, even when a mandamus petition seeks a judge's recusal based on an assertion of actual bias, mandamus remains "a discretionary writ." Id. Because its origins are equitable in nature, the writ should issue to remedy a wrong, not to promote one -- and it should not "be granted in aid of those who do not come into court with clean hands." United States v. Fisher, 222 U.S. 204, 209 (1911).

In this case, principles of equity caution against exercising discretion to reach out for the disqualification issue here and now. To explain why, we must remind the reader that mandamus is a potent weapon. Precisely because the writ packs a considerable wallop, litigants are sometimes tempted to employ it for its strategic value, regardless of the merits of their cause. See Allied-Signal, 891 F.2d at 970; In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1312-16 (2d Cir. 1988), cert. denied, 490 U.S. 1102 (1989). Ignoring this possibility when, as now, a petition for mandamus seeks the disqualification of a judge shortly after the judge decides a major point against the petitioner would be to blink reality. In the real world, recusal motions are sometimes driven more by litigation strategies than by ethical concerns.

In such straitened circumstances, appellate tribunals must be especially alert to the dangers of manipulation. Courts can ill afford to permit mandamus to be used as a tactic to jettison an impartial judge whose slant on a case, as evidenced by his rulings, jeopardizes a party's chances for ultimate success. See In re United Shoe Mach. Corp., 276 F.2d 77, 79 (1st Cir. 1960) ("We cannot permit a litigant to test the mind of the trail judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge.") (citation and internal quotation marks omitted); cf. Reilly v. United States, 863 F.2d 149, 160 (1st Cir. 1988) (explaining that "when a trial judge announces a proposed course of action which litigants believe to be erroneous, the parties detrimentally affected must act expeditiously to call the error to the judge's attention or to cure the defect, not lurk in the bushes waiting to ask for another trial when their litigatory milk curdles"). By like token, courts cannot afford to spawn a public perception that lawyers and litigants will benefit by undertaking such machinations.

This case runs up just such a red flag. While the record does not compel a finding that petitioner and its lead attorneys delayed any attempt to retract Maine counsel's waiver as part of a plot to await the results of the judge's impending decision, the chronology is suggestive. The scenario lends itself to the following description: Cargill, armed with all the relevant facts no later than January 14 and knowing that the judge planned to decide the key motion in the case during the following

week,[8/] held its "appearance-of-impropriety" and "invalid waiver" arguments in reserve, deferred any recusal initiative, awaited the ruling on the motion to dismiss, found that ruling to be greatly disappointing, and then pulled the recusal option off the shelf in hopes of locating a more sympathetic trier.

Of course, Verner, Liipfert tries strenuously to explain away this chain of events. The firm's attorneys have regaled us with descriptions of both their busy travel schedules and the inclement weather that struck the nation's capitol during January of 1994. But even if we were to take these excuses at face value, they are simply not sufficient to justify the firm's decision to sit silently by until the judge had showed his hand.

We believe it is self-evident that, once Cargill was aware of the details surrounding Petruccelli's relationship with the judge, it should at a bare minimum have told the court that it wanted time to rethink its options and sought a delay in the issuance of the court's opinion (which it knew to be imminent). In all probability, it would have taken no more than a telephone call or a facsimile

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8/ The various affidavits submitted by the petitioner to the district court establish that on Wednesday, January 12, the very day that the disclosure conference was held, Pierce, Atwood informed Verner, Liipfert of what had transpired, including the judge's plan to issue his decision in approximately one week. A corporate official was told of the situation no later than Friday, January 14.

transmission to place matters on hold.[2/] Thus, putting the most favorable face on the situation, it is apparent that Cargill and its lead counsel neglected to act with the immediacy that the circumstances obviously required.

Our need to exercise discretion also demands that we take a related point into account. The case at hand is different than our earlier precedents in several respects. First, it does not involve a claim of actual bias, and, thus, it lacks one important ingredient that in the past often prompted us to undertake review of judicial disqualification orders at the earliest practicable time. See Union Leader, 292 F.2d at 384. When issuing the writ is necessary to promote public confidence in the courts by avoiding the unseemly spectacle of trial before a biased judge, the need for immediate relief is manifest. See In re United States, 666 F.2d at 694. These concerns are lessened where, as here, there is neither a trace nor a suggestion of actual bias. Second, in this case, the party who now claims to be aggrieved earlier had made an express waiver of the stated ground for disqualification. This, too, changes the calculus of public perception.

Last, but far from least, petitioner's course of conduct -- whether conniving or merely slipshod -- influences our assessment of the equities. Its handling of the matter places us between Scylla and Charybdis: if we do not entertain the petition, we run a risk of seeming

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2/ Cargill suggests that it might have offended the judge by taking such action. We think its concerns are overblown: lawyers run such a risk every time they seek a judge's recusal. In any event, trial advocacy is no sport for the timorous.

hesitant to inquire too deeply into a possible abuse of judicial power; yet, if we entertain the petition despite the appearance of sandbagging that Cargill has created, we run a risk of eroding public confidence in the courts by seeming to reward a litigant for its gamesmanship.

Given the fundamental nature of mandamus, declining jurisdiction in the exercise of our informed discretion seems preferable. Though it might be mere coincidence that the delay in seeking to set aside the waiver worked to Cargill's advantage by allowing it to see which way the wind was blowing before deciding whether to urge recusal, the appearance of judge-shopping is sufficiently pronounced that the equities counsel restraint. See, e.g., Apple v. Jewish Hosp. & Medical Ctr., 829 F.2d 326, 334 (2d Cir. 1987) (noting that a "movant may not hold back and wait, hedging its bets against the eventual outcome"); Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986) ("Counsel, knowing the facts claimed to support a § 455(a) recusal for appearance of partiality may not lie in wait, raising the recusal issue only after learning of the court's ruling on the merits."), cert. denied, 481 U.S. 1016 (1987). We simply cannot afford to nourish the impression that the courts, as an institution, will bend over backward, overlook the obvious, and countenance sharp tactics merely because they are directed at a judge.

IV. CONCLUSION

We need go no further. Petitioner has neither met the conventional requirements for mandamus relief nor

satisfied us that, in the unique circumstances of this case, the equities favor an affirmative exercise of our discretion. Consequently, we deny the petition, without prejudice to Cargill's right to raise its claim of error, if it so chooses, in an end-of-case appeal.[10/]

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The petition for writ of mandamus is denied.

-- Appendix follows;
dissenting opinion follows appendix --

10/ Just as orders disqualifying or refusing to disqualify counsel "can be reviewed as effectively on appeal of a final judgment as on an interlocutory appeal," Richardson-Merrill, Inc. v. Koller, 472 U.S. 424, 438 (1985), we see no reason whey orders pertaining to judicial disqualification cannot be effectively reviewed at that time and in that manner. Nor is this scenario oddly configured. An end-of-case appeal is a matter of right, while mandamus is a matter of discretion. Courts have frequently found that difference dispositive in analogous circumstances. See, e.g., Allied Chem Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980) (per curiam); In re Bushkin Assocs., 864 F.2d 241, 244 (1st Cir. 1989). And, moreover, the fact that a lengthy trial has intervened will not rob an appeal of its effectiveness. See, e.g., Stauble v. Warrob, Inc., 977 F.2d 690 (1st Cir. 1992) (vacating judgment on direct appeal following 35-day trial, despite the circuit court's earlier denial of mandamus relief on the same ground).

APPENDIX
CHAMBERS CONFERENCE
January 12, 1994

THE COURT: This is a very simple matter, I think. At least the reason for the conference, so you don't have to get all excited about it, is because Mr. Bates is counsel in this matter and I have a disclosure that I must make to counsel.

Approximately on December 19th, 1993, while Mrs. Carter and I were in the course of looking for a new house, I got in a controversy with a party in a contract, a purchase and sale, a minor controversy.

I, on that date, called Gerald Petruccelli, Mr. Bates's partner, and I asked him if he could give me advice and perhaps represent me if it came to that.

He called me back on December 20th and said that he had decided there was no impediment to this representation of me. I met with him on December 21 for about 45 to 50 minutes, we discussed the matter. I told him that I wanted a quick resolution -- I should practice what I preach.

I had telephone conferences with him about the matter on December 22, 23, 28 and 29, four or five minutes a piece. I understand from him that he had telephone conferences during that period of time with another attorney and on January 6th, 1994, the matter was resolved to my satisfaction. On the 7th, Mr. Petruccelli rendered to me his bill and on the 10th, that bill was paid in full.

The understanding at the conference that I had with him on the 21st of December was that I would pay the usual rate, usual fee computed at the usual hourly rate for the hours of devotion to the case that he would charge to any stranger off the street. And I was very serious about that, and I'm sure that he was and I think the bill was entirely satisfactory one to me, and I have no reason to expect that it is to him. So we have no kind of debt of any kind to each other out of this very brief transaction.

I will tell you that I am morally certain in my own mind that this series of events will not in any way affect my ability in the way I would find it to be properly decided, even if the event had not occurred.

However, under the code, the canons of judicial conduct, I felt arguably perhaps, but I felt that it was proper, perhaps required, but at least proper that I disclose it and see if anyone has any objection in my continuing to serve as the judge who will ultimately decide this case.

MR. BATES: Speaking for the plaintiff, we have absolutely no objection.

THE COURT: The record should also reflect that I never had any conversation with Mr. Bates or anyone else of Mr. Petruccelli's office.

MR. O'LEARY: Speaking for the defense, there is no objection.

THE COURT: I wanted you to know this. That's all I have. We have been for some time -- I have been in the course of dealing with motions which raise some very interesting and difficult questions and I expect that within a week or so I will be in a position to file a decision resolving that, so the matter can go forward. I apologize having held the matter up that long but these are very tough things, not matters of first impression, and I don't have a lot of guidance by better judges than I.

MR. O'LEARY: Thank you.

MR. BATES: We appreciate it.

THE COURT: Thank you very much. Another matter, the Graffam, matter, is scheduled for trial, which is in your office on the other side, you might just talk with them about it, Bill Kayatta, apprise him of what has happened and tell him that matter is also scheduled for conference for the same purpose so he can have a chance to reflect on it.

MR. BATES: I don't know that this needs to be a part of the record. I know that Gerry[*] told me that he was going to call Bill Kayatta, and did so.

*[Refers to Gerald Petruccelli.]

THE COURT: Gerry[*] did call and tell me that he had called someone to see if that would create, if his representation would create any problem and I didn't know what case it was about or who the lawyer was. Ultimately he called me back and told me that he had found no impediment to his representation.

MR. O'LEARY: I appreciate the disclosure.

[End of conference]

CAMPBELL, Senior Circuit Judge, (dissenting). While the question is exceedingly close, I regret that I cannot agree with the court. The court's opinion would be persuasive if written before the Judicial Conference of the United States had adopted Canon 3D of the Code of Conduct for United States Judges. But the court's opinion seems to me to pay too little attention to the district court's failure to have observed the Canon. Canon 3D provides,

> A judge disqualified by the terms of Canon 3C(1), except in the circumstances specifically set out in subsections (a) through (e) may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If the parties and their lawyers after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding. (emphasis added).

Canon 3D applies squarely to the situation here, in which a judge has sought the parties' waiver of his mandatory disqualification under § 455(a). Congress expressly allows a judge to accept a waiver of his disqualification under § 455(a) (appearance of lack of impartiality) although not under § 455(b) (bias, personal knowledge of facts, financial interest, etc.). See 28 U.S.C. § 455(e). But while § 455(e) specifies no more than that such waiver be

preceded "by a full disclosure on the record of the basis for disqualification," the judiciary is also subject to its own Canon 3D which imposes additional conditions that were not followed here. For that reason, I disagree that the parties ever effectively waived the duty imposed by § 455(a) that the judge disqualify himself.

I make two points at the outset. First, as my colleagues seem to concede, the judge's employment, as his own lawyer, of the senior partner of the law firm representing plaintiffs at the time he was considering a major dispositive motion in plaintiffs' lawsuit, gave rise to a reasonable question of his impartiality under § 455(a). While this was hardly a major indiscretion as such matters go, it was the kind of conduct that gives rise to an appearance of impropriety. Our court is in apparent agreement as to the applicability of § 455(a). However, because the district court felt otherwise, and because the issue deserves consideration, I have stated my reasons for finding that § 455(a) applies in an appendix to this dissent. Section 455(a) required the judge to disqualify himself sua sponte unless he received and accepted an appropriate waiver from the parties.

A second point is that the proceedings at the January 12 conference -- at which the judge candidly and commendably disclosed the matter -- omitted to follow Canon 3D in basic ways. Canon 3D was developed to offset the criticism that otherwise disqualified judges sometimes secured the parties' agreement to allow them to continue in cases by taking advantage of counsel's natural reluctance to offend a judge before whom they frequently

had to appear. The original language of Canon 3D was drafted by a special committee of the American Bar Association chaired by the former chief justice of the Supreme Court of California, Justice Traynor. Justice Traynor emphasized that, before a valid waiver could occur, counsel must receive an opportunity to confer with their clients outside the judge's presence. The special committee also believed that the client as well as counsel had to be involved in the waiver decision, as the "parties are less likely than counsel to feel judicial pressure [to remain in the case] . . . ." Broadening and Clarifying the Grounds for Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. of Courts, Civil Liberties and the Administrative Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. (1974).

The Canon serves in part to dispel counsel's sense that by failing immediately to endorse the judge's continued presence in the case, counsel might annoy the judge and prejudice their cause. Under the Canon, counsel must be extended an opportunity to consider the disqualification issue outside the judge's presence, hence free from the fear that any hesitancy to endorse the judge's continued presence may be personally held against him.

In the present case, the judge never stated that local counsel was free to withdraw and discuss disqualification with his client and co-counsel. The judge knew or should have known at this time that counsel had no prior opportunity to discuss the issue with his client. The judge had not disclosed the subject of the conference in advance. Local counsel had made express inquiry the day previous

as to what the January 12 meeting would be about and could learn nothing. Counsel, therefore, could not have discussed the issue with his client and lead counsel prior to the meeting. When he came to the conference, local counsel had to react on the spur of the moment, without knowing what rights the judge was prepared to recognize, without knowing whether the judge would recuse himself if counsel objected, and without reassurance from the court that, without offense, local counsel would be given a chance to consider this matter with his client outside of the court's presence. The express language of the Canon, conditioning a waiver upon an opportunity to confer with the parties and counsel outside the judge's presence, was not, in these circumstances, put into play.

In hindsight, to be sure, local counsel could have sought to save the situation by requesting time to talk to lead counsel and his client -- a request the judge indicates he would have granted. However, without the judge's advance advice, counsel would not necessarily be expected to know of his rights under Canon 3D, or indeed to know that Canon 3D existed at all. Moreover, counsel may have felt that, where the judge stated that the disclosed conduct would not affect his ability to decide the case, and indicated no clear willingness to withdraw, any hesitancy would simply be an irritant. The duty to extend the benefits of this Canon to the parties rests upon the judge. Here the judge did not mention the provisions of the Canon nor indicate what rights he would recognize.

In such circumstances, I think it plain that no waiver occurred on January 12. In fact, the scenario at

the January 12 conference was exactly the one that Canon 3D was intended to change. The drafters of Canon 3D thought that a judge who simply announced disqualifying facts, indicated his desire to continue to serve, and solicited and accepted oral waivers from the attorneys present, might be exercising a "velvet blackjack." Broadening and Clarifying the Grounds for Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. of Courts, Civil Liberties and the Administrative Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. (1974). Canon 3D, by requiring discussion with the clients outside the judge's presence and, by requiring the clients' acquiescence as well as that of counsel, sought to ease the pressures to acquiesce that inhered in the "old" process.

It is true that the Code of Judicial Conduct is not statutory, nor does the Judicial Conference of the United States which adopted the Code hold a specific statutory grant of authority to enact binding ethical rules. However, the Conference is itself a creature of statute. See 28 U.S.C. § 331. Chaired by the Chief Justice, the Conference is the one body recognized as speaking administratively for the entire federal judiciary. Its adoption of Canon 3D, I suggest, gives the Canon great persuasive weight. Additionally, the provisions of Canon 3D emanated from a model ethical code drafted by the American Bar Association and adopted in one or another version, by many states. It is important, I think, to our institutional credibility, that the procedures set out in Canon 3D of the Code of Conduct for United States Judges be taken seriously.

As, in my view, no waiver occurred by force of local counsel's acquiescence on January 12, the question arises whether some kind of de facto waiver or equitable bar should be implied from Cargill's failure to object promptly to the judge's continued participation once its local counsel had told it of the judge's disclosures. Cargill also learned at the January 12 conference that the judge was about to hand down his ruling. If Cargill did not want the judge to participate, my colleagues believe that Cargill was required to protest then and there, rather than strategically waiting to see how the wind blew, objecting -- as it did -- only after the judge had ruled against it.

This is a close question. There is certainly weight to my colleagues' view that Cargill may be misusing the Canon now for purely strategic purposes. It can be implied, moreover, that the district court having fully revealed the conduct in question, sincerely, if incorrectly under the Canon, relied on local counsel's approval, not withdrawn, as sanctioning the court's continuance in the case. But while reasonable minds may differ, I believe that the court's failure to follow Canon 3D's waiver procedures so clouded future events as to make it inappropriate to read too much into Cargill's failure to challenge the judge's continued participation during the week prior to the court's ruling on the motion. A primary purpose of the procedure outlined in the Canon is to remove, or at least to lessen, the pressure of the judge's feared resentment if a waiver is not quickly volunteered. This lessening of pressure would not have happened here. The Canon anticipates that the court will reassure attorneys in advance of their right to speak to their clients

out of the judge's presence. Also that the judge will inform counsel that he will withdraw if waiver is not granted, or, at least, of his intentions in this regard. In the present case, by the time Cargill learned of the judge's stated grounds for disqualification, the judge had already made the decision not to recuse himself. At that point, Cargill had no assurance that its repudiation of local counsel's acquiescence would be honored. It had to decide whether to risk angering the judge futilely at a time when the matter seemed to have been settled and a decision on its motion was imminent.

To be sure, Cargill's local counsel could have acted differently. It is often true -- and properly so -- that a client is bound by positions taken or not taken by his attorney. Canon 3D makes it clear, however, that attorney acquiescence, standing alone, is not enough to constitute a waiver. Local counsel's acquiescence followed by Cargill's reluctance to object cannot be disassociated from the judge's initial failure to implement the Canon provision -- a provision that the judge himself is responsible for explaining and implementing in the first instance. Canon 3D, setting out the requirements for a judge to secure a valid waiver of his own disqualification, is not mere grist for the adversarial mill. Rather, it is a rule of conduct the judge is supposed to know and apply. While Cargill's counsel might have saved the situation, responsibility for the error should not too easily be shifted to the shoulders of one of the parties. Given the altered situation confronting Cargill once the die had been cast on January 12, I am not disposed to find that Cargill ratified

local counsel's earlier acquiescence simply by taking no action before the court's decision.

Cargill, to be sure, had to act diligently if it wished to challenge the judge. Delay would soon become unfair to Cargill's opponent, who would continue to invest money and effort into the lawsuit in reliance upon the continued service of the judge in question. But Cargill's raising of an objection within a month after the decision seems to me to be acceptable given that the initial error was that of the judge, not Cargill. In so saying, I recognize the validity of my colleagues' concern that Cargill may well be acting strategically, and that courts are, and should be, reluctant to allow two bites at the apple. But against this must be weighed the nonobservance of Canon 3D.

As § 455(a) applied and, in my view, no sufficient waiver occurred under § 455(e), the question of remedy arises. In Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 862-64 (1988), the Supreme Court wrote:

> A conclusion that a [§ 455(a)] violation occurred does not, however, end our inquiry. As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a) . . . . We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is

> appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

See also In re Allied-Signal, Inc., 891 F.2d 975-76 (1st Cir. 1989).

For a new judge to be brought in at this juncture would not, in my view, be a draconian remedy, nor a license for unwarranted attacks on courts. To be sure, the question that arose here -- the judge's brief use of the senior law partner in the same law firm retained by plaintiffs -- was not monumental and quite likely would have been waived by Cargill in a proper proceeding. Moreover, evidencing his integrity, the judge quickly called a conference and revealed all the relevant facts. Nonetheless, the judge's retention of Mr. Petruccelli at the time of the pending lawsuit did create the appearance of lack of impartiality; and section 455(a) required the judge to step aside unless he received proper waivers from the parties. As this did not occur here, and as the case is still at an early stage, I think it would be reasonable for another judge to enter the case. While this imposes some small price on the court and plaintiffs, it is justified as demonstrating the need to observe the Canon.

I would add that, had mandamus requiring a new judge been granted, it would have been open to this court to let stand the former judge's ruling on Cargill's

dismissal motion. Whether to do this would have been a close question, but, however that issue were resolved, the bringing in of a new judge would have emphasized that Canon 3D procedures are not precatory.

I do not take too seriously my colleagues' suggestion that this issue may be revisited several years down the road on direct appeal from any final judgment rendered in plaintiffs' favor. By then there would be overwhelming equities in plaintiffs' favor not to require them to undergo the expense and burden of retrying the case before a different judge. The Supreme Court has stated "that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties." Liljeberg, 486 U.S. at 864. Mandamus has been properly recognized as the usual and proper remedy for raising and resolving promptly a question of judicial disqualification such as this. See, e.g., Alexander v. Primerica Holdings, Inc., 10 F.3d 155 163 (3d Cir. 1993); In re United States, 666 F.2d 690, 694 (1st Cir. 1981). I would expect that the court's decision, which has been rendered after the most careful consideration by all members of the panel, will end the matter.

Appendix to Judge Campbell's Dissent

For the following reasons, I conclude that the judge's relationship with Mr. Petruccelli required him to recuse himself under 28 U.S.C. § 455(a) absent receipt of the parties' waiver. That statute provides that a judge "shall disqualify himself in any proceeding in which his

impartiality might reasonably be questioned." (emphasis supplied). The legislative history indicates that section 455(a) was meant to lessen the traditional "duty to sit," and, as the Supreme Court has indicated, to require avoidance of even the appearance of partiality. Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 860-61 (1988). Recusal may be required even in the absence of actual partiality if there is an objectively reasonable basis for doubting the judge's impartiality. Id.; see Code of Judicial Conduct Canon 2 (1973) ("[A] judge should avoid impropriety and the appearance of impropriety in all his activities.") (emphasis supplied). The Committee on the Codes and Conduct of the Judicial Conference of the United States stated that

> where an attorney-client relationship exists between the judge and the lawyer whose law firm appears in the case, the judge should recuse absent remittal.

2 Administrative Office of the U.S. Courts, Guide to Judiciary Policies and Procedures V-25 (1993).

The proper standard for ascertaining whether a judge's impartiality might reasonably be questioned under § 455(a) is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt, not in the mind of the judge, or even necessarily that of the litigant, but rather in the mind of the reasonable person. See United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977). Section 455(a) requires a contextual, case-by-case analysis.

It does not imply a bright-line rule disqualifying any judge who ever has personal dealings with an attorney whose firm represents litigants before the same judge. The existing case law on the subject of judge-attorney dealings rests on exceedingly fact-specific judgments, with different outcomes in different situations.[11/]

Having said this, certain principles seem clear. A judge would ordinarily be disqualified to sit by § 455(a) if an attorney in the case before him or her were, at the same time, actively representing the judge in a personal matter. See 13A Charles Wright, Arthur Miller & Edward Cooper, Federal Practice and Procedure § 3549 at 614 (1984); cf. Potashnick, 609 F.2d at 1110-12; Texaco, 354 F.2d at 657. And while the situation is more attenuated where the judge is being personally represented not by the same attorney but by someone else in the attorney's firm, the latter situation is at least cause for concern, as there can be no doubt that, in many factual

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11/ See In re Placid Oil Co., 802 F.2d 783 (5th Cir. 1986); Potashnick v. Port City Constr. Co., 609 F.2d 1101 (5th Cir.), cert. denied, 449 U.S. 820 (1980); Texaco v. Chandler, 354 F.2d 655 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966); Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965); In re Snowshoe Co., 137 B.R. 619 (D. W. Va. 1991), aff'd mem., 953 F.2d 639 (4th Cir. 1992); Carbana v. Cruz, 595 F. Supp. 585 (D.P.R. 1984), aff'd mem., 767 F.2d 905 (1st Cir. 1985); Miller Indus., Inc. v. Caterpillar Tractor Co., 516 F. Supp. 84 (D. Ala. 1980); Smith v. Sikorsky Aircraft, 420 F. Supp. 661 (C.D. Cal. 1976). See also Varela v. Jones, 746 F.2d 1413 (10th Cir. 1984); S.J. Grove & Sons Co. v. I.B.T., 581 F.2d 1241 (7th Cir. 1978); United States v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977), cert. denied, 434 U.S. 1035 (1978); In re Georgetown Park Apt., 143 B.R. 557 (Bankr. 9th Cir. 1992). Cf. In re Allied-Signal, Inc., 891 F.2d 974 (1st Cir. 1989).

situations, such overlap can create the appearance of partiality calling for withdrawal under § 455(a). The members of the Judicial Conference Committee advising judges as to the proper interpretation of the Code of Conduct have said as much. See 2 Guide to Judiciary Policies and Procedures, supra, at V-25.

Weighing all the factors in the present case -- in which I entertain no doubt whatsoever as to the judge's personal integrity -- I nonetheless believe that a reasonable person viewing all the circumstances might have questioned the impartiality of the judge. The judge's ruling to the contrary was, I believe, an abuse of discretion. See In re United States, 666 F.2d 690, 697 (1st Cir. 1981) (a federal judge's decision on whether to recuse himself or herself is committed to that judge's sound discretion).

The judge received personal legal services from the senior partner of Petruccelli & Martin, a small eight-member firm, close to the time the court ruled upon a dismissal motion that, had it been resolved for Cargill, would have put Petruccelli & Martin's client out of court. The problem is not simply that by personally retaining Mr. Petruccelli, the judge indicated he had high regard for the latter's professional abilities. Judges may and often do, with propriety, indicate respect for an attorney's competence. Here, however, by retaining the senior partner of this small firm for personal legal advice while having under advisement a dispositive motion in a case being handled by other members of the firm, the court gave the appearance that he may have had a particular

affinity for that firm and perhaps some close and special relationship. Other attorneys in the same case could reasonably have been offended by what might have appeared, from the outside, to have been a confidential relationship between the judge and Mr. Petruccelli at that particular time. Also, even after the ending of the judge's own attorney-client relationship, an outside observer might wonder if, in some manner, consciously or unconsciously, the judge's appreciation for a job well done by plaintiff's law firm might possibly affect his handling of the pending case.

The judge's brief attorney-client relationship with Mr. Petruccelli ended, it is true, before the judge's decision in the case against Cargill. The judge, however, had worked on Cargill's motion during the period of that relationship. Moreover, the relationship ended only ten days before the decision -- a period too short to insulate the two events from one another. Any appearance of partiality that existed prior to the time the representation ceased cannot be meaningfully separated from the court's decision of January 19.

It is important to emphasize that 28 U.S.C. § 455(a) is concerned with the appearance of impartiality. Liljeberg, 486 U.S. at 860-61. Disqualification for actual personal bias or prejudice is separately covered by § 455(b)(1). The judge seems to have overlooked the appearance aspect of the statute when he emphasized at the January 12 conference his moral certainty that his handling of the case would not be affected by the relationship with Mr. Petruccelli. The question was not just whether he

was biased or prejudiced, but whether his impartiality might reasonably be questioned, a related but different matter.[12/] According to the House Report accompanying amendments to § 455,

> Subsection (a) of the amended section 455 contains the general, or catch-all, [of Canon 3C] that a judge shall disqualify himself in any proceeding in which 'his impartiality' might reasonably be questioned. This sets up an objective standard, rather than the subjective standard set forth in the existing statute . . . . This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. The language also has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute . . . .

12/ Section 455 was completely rewritten by Congress in 1974 so as to conform with the then-new Code of Judicial Conduct which the Judicial Conference of the United States had adopted in 1973 as being applicable to all federal judges. Section 455 was amended so as nearly to duplicate the Code's Canon 3C, with the intention that federal judges "would no longer be subject to dual [i.e.] Code and statutory standards governing their qualification to sit in a particular proceeding." H. Rep. No. 93-1453, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 6351. The Code of Judicial Conduct was drafted under sponsorship of the American Bar Association by a committee chaired by former California Chief Justice Roger J. Traynor. The other committee members included Justice Potter Stewart of the U.S. Supreme Court, Judge Irving R. Kaufman of the U.S. Court of Appeals for the Second Circuit, and Judge Edward T. Gignoux of the U.S. District Court for the District of Maine.

H. Rep. No. 93-1453, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 6351.

To be sure, the drafters of the statute were also concerned, as are my colleagues here, that the statute not be used by litigants for purely strategic purposes. The House Report cautions that the new test should not be used by judges to avoid sitting in difficult or controversial cases. Disqualification for lack of impartiality must always have "a reasonable basis." Id. (emphasis in original).

Yet the question at issue is, objectively, whether the circumstances reasonably gave rise to a question of the judge's impartiality. If so, the judge shall disqualify himself. An express purpose of the 1974 rewrite of § 455 was to abandon the subjective standard of the older statute, which had depended largely on the judge's personal view of whether he or she could behave impartially. Unfortunately, the circumstances here created a situation where a reasonable observer could entertain doubts as to the judge's impartiality. The judge himself obviously had concerns about the appearance of what had happened, leading him to call the conference of January 12 for the purpose of disclosing what had transpired.

That a question of the judge's impartiality under § 455(a) existed does not mean that the judge committed a serous impropriety. The judge explained that he did not immediately focus on the fact that Mr. Petruccelli's firm, partners and associates were involved in the case pending before him. Once aware, the judge commendably disclosed the relationship. This action speaks loudly as to the judge's personal integrity. The fact remains, however, that a reasonable observer could objectively question the

judge's impartiality in the particular circumstances. The judge was, therefore, required to remove himself unless he had received the parties' waiver.

UNITED STATES DISTRICT COURT

DISTPICT OF MAINE

FREDERICK ASHMORE, DAVID BOYA, WILLIAM SIMONE, and RICHARD SIMEONE, Plaintiffs v. NORTHEAST PETROLEUM DIVISION OF CARGILL, INC., NORTHEAST PETROLEUM CORPORATION OF MAINE, NORTHEAST PETROLEUM CORPORATION OF CAPE COD, d/b/a NORTHEAST PETROLEUM, and CARGILL, INC., Defendants	)Civil No.)93-199-P-C

GENE CARTER, Chief Judge

MEMORANDUM OF DECISION AND ORDER

This action is before the Court on Defendant Cargill's Motion for Recusal and Withdrawal of Order (Docket No. 29). Defendant Cargill seeks this Judge's recusal under section 455(a) which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §

455(a). In addition to recusal, Cargill seeks withdrawal of this Court's Decision and Order dated January 19, 1994 (Docket No. 16) arguing that substantial work was done on that Order at a time when this Judge's impartiality might have been reasonably questioned. Plaintiff opposes this motion, arguing that this Judge's impartiality could not reasonably have been questioned under the circumstances, that Defendant has waived objection to the Judge's continued service on this matter, and that even if Defendant has not waived objection the Order of January 19, 1994, should not be withdrawn.

BACKGROUND FOR THE MOTION FOR DISQUALIFICATION

The following facts form the basis for Cargill's motion for disqualification. While this Judge and his spouse were looking for a new house last fall, a minor controversy over a purchase and sale agreement arose. To resolve this controversy this Judge retained the services of Gerald Petruccelli, a partner at the firm which represents the Plaintiffs. What follows are the specific details of that representation as disclosed to counsel at a conference held on January 12, 1994, and in the Court's Notice to Counsel (Docket No. 24) dated February 14, 1994.[1/]

On December 19, 1993, when the controversy regarding the purchase and sale agreement arose, this Judge called Mr. Petruccelli. After a brief telephone conversation on December 20, 1993, a meeting of forty-five to fifty minutes in duration took place on December 21, 1993, at which this Judge retained Mr. Petruccelli's

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1/ For a record of the conference see Transcript of Conference attached to the Affidavit of Pauline Terry (Docket No. 40).

services at his regular hourly rate. My instructions to him were to obtain a quick resolution of the controversy. Thereafter telephone conferences between this Judge and Mr. Petruccelli occurred on December 22, 23, 28, and 29 of four to five minutes each. On January 6, 1994, Mr. Petruccelli advised me that the matter was resolved and on January 7, 1994, he sent me his bill. I paid this bill on January 10, 1994. Since that time, and prior to this occasion Mr. Petruccelli has never represented this Judge in any other matter.

At the time I retained Mr. Petruccelli's services, I had no conscious awareness that Mr. Petruccelli or his firm was involved in this specific litigation then pending before me. Notice to Counsel (Docket No. 24) at 2. Mr. Petruccelli himself has not signed papers in this matter or appeared in Court for Plaintiffs, and to the best of this Judge's knowledge has played no personal role in representing Plaintiffs. A few days after I had retained Mr. Petruccelli, I asked my Docket Clerk to prepare a list of any pending cases in which his law firm represented either a plaintiff or a defendant. There were two such cases, and I decided that a disclosure of the representation was appropriated.[2/]

On January 11, 1994, I asked my Docket Clerk to schedule a meeting of local counsel in this action so that I could advise them of this representations.[3/] In that

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2/ The Court has previously stated that there were three such cases. The Court's recollection was in error. There were in fact only two cases on the list.

3/ Attendance of local counsel alone was requested by the Court because it anticipated that the conference itself would be extremely

(continued...)

conference, which occurred on the next day, January 12, 1994, I disclosed the subject matter and the course of Mr. Petruccelli's representation during the previous three week period. In addition to this disclosure, I advised counsel that I had had no conversation with any other member of the Petruccelli & Martin firm. I did not request a waiver at any time intending to give counsel time to reflect on the matter. Local counsel for both Plaintiff and Defendant immediately stated that they had no objection to my continued service as judge in this matter. After these waivers were made, I advised counsel that the decision on Defendant Cargill's Motion to Dismiss in this action would be forthcoming within the week.[4/]

After the conference, local counsel for Cargill, John J. O'Leary, called Cargill's Washington D.C. counsel, Bernhardt K. Wruble, to notify him of the substance of the conference, including the fact that an opinion on the pending motion would be issued within a

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3/(...continued)
brief, and that local counsel could consult with the parties or out-of-state counsel after a full disclosure was made.

4/ On August 4, 1993, a Complaint (Docket No. 1) was filed on behalf of Plaintiffs by Daniel W. Bates and Kenneth D. Keating, attorneys with the firm of Petruccelli & Martin, stating claims under federal antitrust law as well as state contract and tort claims. On September 2, 1993, the Court received Defendant Cargill's Answer (Docket No. 3) and Motion to Dismiss Count I and the State Law Claims of Plaintiff Ashmore. (Docket No. 4). Plaintiff's Objection to the Motion (Docket No. 7) and Defendant's Reply to this Response (Docket No. 12) were received by October 5, 1994. Thus the Motion was pending for at least three and a half months before the Court. During twenty days of this period the Judge was represented by Mr. Petruccelli.

week.[5/] See Affidavit of John J. O'Leary (Docket No. 33); Affidavit of Bernhardt K. Wruble (Docket No. 31) ¶ 3. Mr. Wruble placed a call to Cargill an January 12, 1994, leaving a message for Cargill's in-house counsel. On Friday, January 14, 1994, Chriss B. Wetherington, of D.C. counsel, spoke to Cargill's counsel and advised him of the substance of the Court's disclosure on January 12, 1994 and the Court's forthcoming decision. Affidavit of Chriss B. Wetherington (Docket No. 32) ¶¶ 3-4. The following Monday was a holiday, and on Tuesday, January 18, 1994 Mr. Wruble discussed the matter directly with Cargill's in-house counsel. Wruble Affidavit ¶ 6. On Wednesday, January 19, 1994, one week (but only four business days) after the conference, the Decision and Order Denying Defendant's Motion to Dismiss was issued (Docket No. 16).

On February 14, 1994, the Court clerk received a letter (Docket No. 20) from Mr. Wruble requesting this Judge's disqualification under section 455(a) on the grounds that the judge's impartiality might reasonably be questioned due to his representation by a partner of Plaintiff's counsel during the pendency of this action. 28 U.S.C. 455(a). Upon receipt of this letter, the Court requested a formal motion for disqualification and provided additional clarifying information for Cargill's D.C. counsel for this purpose. Notice to Counsel (Docket No. 24).

5/ Local Counsel have since withdrawn from representation in this case. Motion for Leave to Withdraw Appearance (Docket No. 22). However, this fact is of no significance in the resolution of the present motion.

DISCUSSION

Section 455(a) provides that any judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). In this case the parties have chosen to emphasize different aspects of this statutory provision in support of their positions. Cargill contends that disqualification is required whenever a person "might reasonably" question the judge's impartiality. Memorandum in Support of Defendant's Motion for Recusal (Docket No. 30) at 3. Plaintiffs, for their part, argue that section 455(a) requires disqualification only when a judge's impartiality "might reasonably be questioned." Plaintiff's Objection to Motion for Recusal (Docket No. 37) at 4.

The First Circuit has made the following observations on the purpose and application of this disqualification procedure, which illuminate the balance between the possibility that someone might infer partiality and that partiality might reasonably be inferred.

> [T]he present objective standard requiring disqualification whenever the judge's impartiality "might reasonably be questioned" . . . . was intended to foster public confidence in the judicial system by requiring disqualification "if there is a reasonable factual basis for doubting the judge's impartiality . . . . H. Rep. No. 1453, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Admin. News 6355. But it was emphasized that litigants are not entitled to have a judge disqualify himself merely because they fear an adverse decision.

> "Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the litigant's fear that a judge may decide against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice."
>
> Id. [Emphasis in the original]. The proper test . . . is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily of the litigant . . ., but rather in the mind of the reasonable man.

United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977)(citations omitted). In light of this objective standard and the lack of any previous decision with facts similar to those presented in this case, the Court will first consider whether the facts in this case would cause "a reasonable, responsible . . . person [to] have doubts about the judge's impartiality." United States v. Chantal, 902 F.2d 1018, 1024 (1st Cir. 1990). The Court will then evaluate its conclusion to determine whether it is consistent with the case law decided under section 455.

As a preliminary matter, it is worth noting that the nature of the alleged impartiality is not related to bias for

or against the parties in this action.[6/] Rather, Cargill argues that a reasonable person would infer impartiality from the choice of a particular lawyer to assist a judge in a personal matter, however routine. In Cargill's own words:

> A reasonable person would instinctively view the selection of legal counsel and the consequent establishment of an attorney-client relationship as creating preferential and disqualifying implications. The judge has displayed a preference for a particular person or firm and is relying upon the firm for the resolution of a matter which involves personal financial considerations . . . .

Defendant's Memorandum in Support of Motion for Recusal at 4.

The Court is of the opinion that, whatever the "instinctive[] view" of a person may be, the reasonable person would pause to examine this reaction considering the extent, timing, and nature of representation, and whether the preference for a particular attorney would extend to that attorney's firm and in turn to that firm's clients. At this juncture a reasonable person must ask himself whether there is any sufficient basis in fact to

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6/ It is well established that section 455(a) disqualification does not hinge on the existence of actual bias. Rather, the purpose of the section is to foster confidence in the judicial system by avoiding the appearance of impropriety. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988)(holding that disqualification was required where the judge was a member of the board of trustees of a university with a substantial financial interest in the outcome of the litigation pending before him).

support an inference of either bias or interest in litigation pending before the judge. Cowden, 545 F.2d at 265.

The Court will review the facts as stated above in this light. It is clear that the extent of the representation was extremely limited in terms of (1) time (less than three weeks), (2) contact (less than one and a half hours by phone and in person, during those three weeks), and (3) subject matter (a routine purchase and sales contract for residential housing). The timing, as Cargill points out, and the Court is the first to admit, is undoubtedly unfortunate as it coincides with a pending motion to dismiss.7/ Nevertheless, the lawyer's fee was billed at the regular hourly rate and the bill paid and representation terminated before any decision issued. No possible reason to seek the favor of Mr. Petruccelli's firm existed after the termination of representation.

As for the nature of the representation, there can be no doubt that it was completely unrelated to the pending litigation, and that the outcome of this litigation would have no effect on the purchase or sale of a home in Maine. Furthermore, the process of buying a home is a routine, though personal matter. Although buying a home is an important undertaking for most people, as it is for this Judge, it is primarily a matter of personal preference and comfort, rather than a decision that implicates any

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7/ An additional fact relating to timing is that the representation of the Judge by Mr. Petruccelli coincided with the Judge's Christmas break, during which time the Judge's chambers were closed from December 24, 1993 through and including January 3, 1994. Hence, for eleven of the nineteen days between the time when Mr. Petruccelli was first consulted and the matter was resolved, no time was dedicated to the motion at issue in this case or any other action pending before the Court.

significant short-term profits or losses as purchases of real estate for investment purposes may. The selection of an attorney to assist in the process of buying a home, when and if one becomes necessary, is much like the selection a personal physician; his particular skills and manner are not interchangeable with those of his colleagues or associates. In fact, personal negotiation skills are perhaps the most important requirement in a controversy where litigation is neither anticipated or desired.[8/] Thus the reasonable person might soon come to the conclusion, based on his own experience, that choosing a particular lawyer from a firm to provide representation in a limited personal matter would indicate no more preference for the other lawyers at that firm, than selecting a particular doctor at a health care organization as a general physician would indicate for the other doctors associated with the organization.

This Court believes that a reasonable person, upon consideration of all the relevant facts, would not infer that this Judge would be partial toward members of Mr. Petruccelli's firm, much less to the firm's clients.[9/] The

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8/ Where extensive or complex litigation is anticipated, generalized assessments of the infrastructure of the firm, and quality of the associates and partners is far more likely; because it is the unusual attorney who would not rely on his colleagues in a major case. Here the Judge did not anticipate litigation, and did not expect any other member of Mr. Petruccelli's firm to be involved in any way in this minor controversy.

9/ Persuasive support for the accuracy of this conclusion is to be found in the history after January 14, 1994, of Graffam v. Scott Paper Co., Civil No. 93-64-P-C, now pending before this Court. That is the other case on the list of those cases pending before this Judge in which Mr. Petruccelli's firm had appeared. Supra at 3 and n.2. There, the Court on January 14, 1994, made a disclosure identical to that made in

(continued...)

Court will now examine whether this conclusion is consistent with the relevant case law. Cargill argues that this conclusion does not comport with the case law because the case law reflects a "uniform rule" that a judge who is represented by a particular attorney must recuse himself if that attorney appears before him. Cargill's Reply Brief (Docket No. 46) at 1. Further they argue that this disqualification extends to all members of the attorney's firm. The Court will address the second assertion first, as it relates directly to this court's conclusion that a "reasonable person" would not infer bias in favor of an entire firm based on the selection of a particular attorney.

9/(...continued)
this case.

Defendant in that case is represented by the same law firm that appeared as local counsel for Defendants in this case, although through different lawyers. There, counsel for both parties immediately stated at the conference that the parties had no objection to this Judge's continuing to preside in that case. Thereafter, both parties in that case, on the eve of commencement of a jury trial, agreed to waive the jury and to try the case to the undersigned as fact-finder. The case, involving claims of significance and substance, was tried in the period February 28 to March 10, 1994, and is now pending before the Court for decision after submission of trial briefs and requested findings of fact.

In terms of the recusal issue generated in this case, the Graffam case is a precise analogue of the present one and demonstrates that even counsel professionally charged with protection of a client's interest in a matter of significance and their clients found no cause to infer any basis for concern about this judge's impartiality; even entrusting, after disclosure of the circumstances, the fact-finding function in that case to the Court.

Cargill relies on SCA Services, Inc. v. Morgan, 557 F.2d 110, 112 (7th Cir. 1977), as the sole source of support for the proposition that "courts have not distinguished between an individual attorney and his or her firm in applying the statute." Memorandum in Support of Motion for Recusal at 4, n. 5. A careful reading of this case does not support this proposition. In SCA Services, the Court of Appeals for the Seventh Circuit first concluded that under Illinois agency law the appearance of a firm was an appearance by every lawyer in the firm. However, the Court went on to distinguish between the applicable standard in agency law, and the involvement required under section 455(b)(5)(ii):

> Having decided that Donald A. Morgan [brother of the judge and senior partner of the firm] is an attorney in this action by virtue of his relationship with the firm of Davis & Morgan is not to decide, however, that he is "acting as a lawyer" within the language and intent of § 455(b)(5)(ii).

Id. at 114. The Court concluded that because the Judge's brother had no role in the case, he was not "acting as a lawyer" in the case under section 455, despite the fact that his firm represented a litigant. Id. Nevertheless disqualification was required for two reasons. First, the brother had significant pecuniary interests in the success of his firm and was therefore disqualified under section 455(b)(5)(iii) which requires dismissal when a close relative of a judge has a substantial pecuniary interest in a matter before the judge. Second, disqualification was also required under 455(a) based on the reasonable assumption that brothers have close personal relationships, are inclined to support each others interests, and therefore the judge might give his brother's firm favorable treatment. Here,

Cargill offers no reason to believe that this Judge has "a close personal relationship" with Mr. Petruccelli, or that any other reasonable basis exists which would create an inclination in this Judge to support Mr. Petruccelli's interests.

Cargill also suggests that a "uniform rule" requires disqualification under section 455(a) when a judge has been represented by counsel for a litigant in an action. In support of this "uniform rule" Cargill cites the following cases: Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966); Potashnick v. Port City Construction, 609 F.2d 1101 (5th Cir. 1980); Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965); Quinones v. Nettleship, Civil No. 82-3063(HL)(D. P.R. Sept. 2, 1983) order reprinted at 595 F. Supp. 589. Smith v. Sikorsky Aircraft, 420 F. Supp. 661 (C.D. Cal. 1976); cf. In re Allied-Signal, Inc., 891 F.2d 974 (1st Cir. 1989); In re Placid Oil Co., 802 F.2d 783 (5th Cir. 1986). In each and every one of these cases the same attorney, and not merely a member of his firm, who had previously or contemporaneously provided extensive representation in litigated matters, was appearing on behalf of a party before the court.[10/] Here, Mr. Petruccelli did not represent the Judge in any litigated matter; he has made no appearance on behalf of Plaintiffs; and there is no allegation that he is involved in any way in this litigation.

10/ If these cases reflect a uniform rule it is the same as that articulated in Cowden; that doubts as to impartiality must be grounded on a reasonable factual basis. In these cases it was not the mere existence of a representative relationship, but involvement extensive enough to suggest that the judges had substantial interests in the performance of the counsel appearing before them due to on-going relationships and/or extensive litigation.

In contrast in Texaco, the judge was contemporaneously represented in a $10,000,000 malicious prosecution, and slander and libel suit by the same attorney who appeared before him. Texaco, 354 F.2d at 656. In Potashnick, the plaintiff's chief trial counsel had represented the judge in two litigated matters in which the judge was a named defendant that arose from on-going joint business dealings between the judge and the attorney. In addition to the relationship with the chief trial counsel, the judge's father was a senior partner in plaintiff's counsel's firm. Potashnick, 609 F.2d at 1101. In Rapp, the judge had been represented by counsel for the parties before him on a writ of mandamus, consulting with them on legal strategy, thus on remand he was disqualified from continuing to hear the case. Rapp, 350 F.2d at 810-11. In Quinones, the attorney appearing before the judge had represented the judge and been a former partner, therefore the judge disqualified himself for a period of two years. Quinones, 595 F. Supp. at 589. In both In re Allied Signal, 891 F.2d 974 (1st Cir. 1989) and In re Placid Oil Co., 802 F.2d 783 (5th Cir. 1986), the role of attorneys in question was insufficient to require disqualification despite previous representation and business dealings with counsel for parties in multiparty litigation. Here, Mr. Petruccelli's involvement in this case is non-existent and his previous representation was minimal. Therefore these cases do not require disqualification under "a uniform rule" which applies to this case.[11/]

11/ This Court is not surprised that no "uniform rule" as such emerges. In section 455(b) Congress enumerated mandatory, non-waivable bases for disqualification of judges. If it had intended the uniform rule Cargill proposes Congress would no doubt have included it either as a non-waivable basis for disqualification, or as an additional subsection to 455(a). The cases Cargill cites stand for the

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In addition Cargill does not address cases which appear to contradict this "uniform rule". In re Snowshoe Co., 137 B.R. 619 (N.D. W.Va. 1991), aff'd, 953 F.2d 639 (4th Cir. 1992); In re Georgetown Park Apartments, Ltd., 143 B.R. 557 (Bankr. 9th Cir. 1992). These cases clearly suggest that some real and reasonable inference of bias or interest must be suggested by the representation of a judge by particular counsel. In In re Snowshoe Co., the Fourth Circuit affirmed a bankruptcy judge's refusal to disqualify himself where a law firm had represented the judge prior to, and possibly during the bankruptcy proceeding. In re Snowshoe Co., 137 B.R. at 620-21. Despite the contemporaneous representation no inference of bias or interest sufficient to suggest impartiality toward the litigants existed because the judge was unaware of the nature of the representation (e.g. exactly where the matter stood on appeal) and had no relationship with the member of the firm who appeared before him as trustee in the bankruptcy proceeding. Id. at 621.[12/] In In re Georgetown Park Apartments, the retention of the services of counsel in the case as personal counsel for the judge did not irreversibly taint the process. Georgetown Park Apartments, 143 B.R. at 559. The judge properly recused

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11/(...continued)
proposition that each case, as section 455(a) requires, will be evaluated on its specific facts, to determine whether a reasonable person would doubt the judge's ability to be impartial in an action in which a particular lawyer is representing a party.

12/ It should be noted that the judge himself had previously disqualified himself where the law firm was a defendant in a case, concluding that he was actually biased in favor of the firm as a litigant. However, there was no factual basis for the conclusion that this favorable bias would affect his attitude toward the firm's clients. In re Snowshoe Co., 137 B.R. at 622.

herself in a fee motion brought by the counsel, and when her personal counsel withdrew from the case she continued to sit. Id. In this case, any apparent impropriety was dissipated when the relationship between this Judge and Mr. Petruccelli was terminated.

In the absence of significant case law dealing with allegations of a preference for particular counsel, this Court has taken note of the dispositions of cases in which prejudice against particular counsel serves as the factual basis for disqualification under section 455(a).[13/] In these cases the Court of Appeals for the First Circuit has required a showing that such prejudice translates into a bias against the client. Panzardi-Alvarez v. United States, 879 F.2d 975, 984 (1st Cir. 1989), cert. denied, 493 U.S. 1082 (1990); In re Cooper, 821 F.2d 833, 838-39 (1st Cir. 1987). Disqualification under section 455(a) requires not only a showing of personal animus towards an attorney but a demonstration that such animus translates into a "bias or personal prejudice to the parties." In re Cooper, 821 F.2d at 839. It is only in "extreme cases in which the judge's attitude toward a party's attorney will be so hostile that it would be reasonable to conclude that the judge will be unable to remain impartial as to the client." Panzardi-

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13/ The Court has found only one case in which bias in favor of an attorney, unrelated to any significant pecuniary interest, was the basis of disqualification under section 455(a). United States v. Ritter, 540 F.2d 459 (10th Cir.), cert. denied, 429 U.S. 951 (1976). In that case the defense attorney in question was on a three-person bar association committee which was handling a resolution to impeach or remove the judge. There, in addition to the inference that the judge might wish to curry favor with the committee considering his removal, the record revealed very favorable and uncharacteristically deferential treatment of the defense attorney in court. Id.

Alvarez, 879 F.2d at 984. Accord, In re Cooper, 821 F.2d at 839.

Here, Cargill has asserted facts which clearly imply a favorable view of Mr. Petruccelli's abilities as an attorney. Beyond this the facts in this case at most suggest a positive assessment of the firm with which he is associated. Such a generalized favorable disposition (assuming it in fact exists) is insufficient to cast doubt on a judge's ability to maintain impartiality toward the litigants. Brody v. President & Fellows of Harvard College, 664 F.2d 10, 11 (1st Cir.), cert. denied, 455 U.S. 1027 (1981)(inference of favorable sentiment towards the judge's alma mater not enough to give rise to reasonable doubt on judge's impartiality); Selfridge v. Gynecol, Inc., 564 F. Supp. 57 (D. Mass. 1983)(judge's friendship with counsel to a litigant was not enough to support disqualification motion under section 455(a)).

In Brody the First Circuit examined the meaning of section 455(a) in light of the entire disqualification scheme under the section and came to the following conclusion:

> As the terms of section 455's additional explicitly mandated bases for recusal suggest, a reasonable suspicion of bias will usually arise only in the presence of such factors as a financial or strong personal interest in one of the litigants.

Brody, 664 F.2d at 11. No personal or financial interest of this Judge in Mr. Petruccelli, Mr. Petruccelli's firm, or the outcome of this case is shown. At the very most there exists an inference of a favorable assessment by this Judge of Mr. Petruccelli's individual professional abilities. The Court concludes, on this predicate, that its assessment that

a reasonable person would not doubt the impartiality of this Judge towards the litigants is consistent with the case law in this area. Therefore, the Court will deny Defendant's Motion for Disqualification under section 455(a).[14/] For the same reason this Court will not

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14/ The Court finds it unnecessary to decide the issue of the existence of a waiver of any disqualification because of its finding that on the merits of the claim for recusal no factual basis for disqualification under section 455(a) existed. The Court does note, however, that the procedures in this case complied with the express requirements of section 455(e). Section 455(e) provides that under subsection 455(a) "waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification." Cargill's contention that additional formalities are required in the case of waiver under section 455(a) are supported neither by the case law, nor the legislative record. In Brody the Court of Appeals for the First Circuit rejected an argument that an attorneys waiver of 455(a) disqualification grounds was not binding on his client because of lack of formality. Brody, 664 F.2d at 11-12. Furthermore, as Cargill points out, the judicial code upon which section 455 was based required additional formalities which are not required by the plain language of the statute. "The statute in its present form, unlike the Code of Judicial Conduct, does not regulate the detailed manner in which the waiver must be effected. . . . The election to proceed after full disclosure of the relevant facts satisfies th[e] requisites and constitutes an effective waiver under the statute." United States v. Nobel, 696 F.2d 231, 236 (3d Cir. 1982), cert denied, 462 U.S. 1118 (1983). Clearly there is a basis for a finding of effective waiver, were that issue to be addressed.

Here, Cargill's D.C. counsel failed to notify the Court that it wished to have time to consider local counsel's waiver of a possible basis for disqualification even though it knew that the Court's decision could be expected within a week. Although under most circumstances a party or its counsel would not waive an objection to potentially disqualifying relationships within a week, where a party's counsel has communicated its waiver to the Court after full disclosure, and has been advised that a major decision will issue within a week, this Court

(continued...)

withdraw the Order of January 19, 1994.

Accordingly, it is ORDERED that Cargill's Motion for Recusal and Withdrawal of Order be, and it is hereby, DENIED.

/s/
GENE CARTER
Chief Judge

Dated at Portland, Maine this 12th day of May, 1994.

14/(...continued)
is of the opinion that failing to notify the Court before the opinion issued would be, if the issue were decided, the equivalent of ratification of this waiver.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FREDERICK ASHMORE, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Civil No. 93-199-P-C
	)	
NORTHEAST PETROLEUM DIVISION OF CARGILL, INC.,	)	
	)	
Defendants	)	

NOTICE TO COUNSEL

The Court has before it Mr. Wruble's letter in the above-entitled matter to the Clerk, dated February 13, 1994 (Docket No. 20), discussing issues in respect to the Court's recusal of itself from further participation herein and the vacation of the Court's Memorandum of Decision and Order entered on January 19, 1994 (Docket No. 16). Defendants have not yet filed any motion seeking recusal of the Court or any other action by the Court. The Court, on February 14, 1994, ordered that other counsel respond to Mr. Wruble's letter of February 13, 1994, on or before February 25, 1994 (Docket No. 21).

The Court, on reflection, takes it to appear that any response to the issues attempted to be generated in the letter of February 13, 1994, should be, in the interests of judicial economy, in response to a formal motion by Mr.

Wruble's client or by any other party, supported as required by Local Rule 19, seeking the Court's recusal or other desired action by the Court. The Court will today order, by separate order, the filing of any motion for recusal or other action by any party to be filed on or before February 28, 1994, and that all such motions be responded to in accordance with the requirements of Local Rule 19.

The Court NOTES in Mr. Wruble's letter of February 13, 1994, two factual misunderstandings in respect to the Court's disclosure that the Court wishes, inter alia, to provide the information to cure in order to assure that the briefing of the issues on any motions that may be filed is focused on the correct factual matrix. The misunderstandings that the Court has noted are:

(1) that the Court excluded foreign counsel for the Defendants from the conference of counsel on February 12, 1994; and

(2) that the Court required a decision on waiver of any objection to the Court's continued participation to be made at that conference.

The facts are that the Court, after retaining Mr. Petruccelli as counsel, asked its docket clerk to provide it with a list of pending cases in which Mr. Petruccelli's firm had appeared as counsel. Several days later, the clerk provided the list. The Court cannot recall the specific date the list was provided. The lists consisted of three (3) cases, of which the present matter was one. Prior to that time, the Court had no conscious awareness that Mr. Petruccelli's firm was counsel in the pending case. The Court instructed its clerk to schedule a

conference of local counsel in the present case on January 12, 1994. The Court's intention was to advise counsel of the circumstances of Mr. Petruccelli's representation and afford counsel an opportunity to confer with clients and other counsel to decide whether they wanted to move for recusal or request other action by the Court.

The Court was scheduled to sit in the District of Puerto Rico for a three-week period beginning on January 24, 1994, and intended to require counsel to decide and advise the Court of their decision with respect to the disclosed matter on or before February 14, 1994. Hence, the Court saw no reason to require foreign counsel for the parties to travel to Maine for the conference of January 12, 1994, the Court expecting that there would be ample time for counsel to confer concerning the matters raised by the Court's disclosure. The Court did not at any time intend to exclude any counsel from the conference of January 12, 1994, and did not do so.

At the conference of January 12, 1994, counsel for both parties, immediately following the Court's disclosure, advised the Court that there were no objections to the Court's continued participation in the case based on the disclosure. The Court accepted those representations as authorized decisions of counsel. The Court proceeded on its belief that there were no objections by any party to its continued judicial participation in the case.

/s/
GENE CARTER
Chief Judge

Dated at Portland, Maine this 15th day of February, 1994.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FREDERICK ASHMORE, et al.,	)	
	)	
Plaintiffs	)	Civil No. 93-199-P-C
	)	
v.	)	
	)	
NORTHEAST PETROLEUM DIVISION OF CARGILL, INC.,	)	
	)	
Defendants	)	

SCHEDULING ORDER #2

The Court's Scheduling Order herein of February 14, 1994 (Docket No. 21), is hereby VACATED, and the Scheduling Conference of the Court and counsel set for this date is hereby CONTINUED to a date to be hereafter set by the Court.

It is hereby FURTHER ORDERED that any party herein who seeks recusal of the Court, or any other action whatever, as a result of the Court's disclosure, in conference with counsel on January 12, 1994, of Mr. Petruccelli's representation of the Court or of the contents of Mr. Wruble's letter as counsel for the Defendants herein of February 13, 1994 (Docket No. 20), file on or before February 28, 1994, a motion pursuant to Local Rule 19 setting forth that party's claim for relief and the basis therefore, supported in accordance with Local Rule 19.

It is FURTHER ORDERED that all adverse parties respond to all such motions as required by Local Rule 19 in a timely manner.

The Court will take further appropriate action in due course.

/s/
GENE CARTER
Chief Judge

Dated at Portland, Maine this 15th day of February, 1994.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FREDERICK ASHMORE, et al.,	)	
	)	
Plaintiffs	)	Civil No. 93-199-P-C
	)	
v.	)	
	)	
NORTHEAST PETROLEUM DIVISION OF CARGILL, INC.,	)	
	)	
Defendants	)	

SCHEDULING ORDER

The Court has this date reviewed the letter of Defendants' counsel, Bernhardt K. Wruble, Esq., dated February 13, 1994, apparently seeking the recusal of this judge from further action in this case. It is hereby ORDERED that all parties adverse to those represented by Mr. Wruble file, on or before February 25, 1994, their written response to the contents of said letter of February 13, 1994, setting forth their respective positions with respect to the issues raise therein.

The Court will take appropriate action in due course.

/s/
GENE CARTER
Chief Judge

Dated at Portland, Maine this 14th day of February, 1994.

[VERNER, LIIPFERT LETTERHEAD]

WRITER'S DIRECT DIAL
(202) 371-6097

February 13, 1994

Ms. Christa K. Thurber, Deputy Clerk
U.S. District Court - District of Maine
156 Federal Street
Room 102
Portland, Maine 04101

Re: Frederick Ashmore, et al. v. Northeast Petroleum, et al., Civil No. 93-199-P-C

Dear Ms. Thurber:

The parties in the captioned action are to meet with Chief Judge Carter for a Local Rule 17(c) conference on Tuesday, February 15, 1994. As the following material addresses a matter to be raised at the conference, we would appreciate your conveying it to Judge Carter at your earliest convenience.

* * *

There is an important matter which we, in fairness, believe should be addressed no later than the initial scheduling conference. Specifically, we believe that the Judge was apparently not properly advised as to whether there were impediments to Petruccelli & Martin's representing him while he presided over this case; that a

judge's contemporaneous representation by opposing counsel is uniformly regarded as a basis for obligatory disqualification under 28 U.S.C. § 455(a); that the defendant should have been informed of the matter in December 1993, when the disqualifying circumstances first arose, and waiver sought if continuing jurisdiction was envisioned; that participation by local counsel in the conference held on January 12, 1994, was not effective to resolve this matter; and that the Court should not have maintained active consideration of the significant motion to dismiss pending during the period of conflict and decided the motion.

Because this series of events has left our client, Cargill, Inc., greatly disquieted; because we believe there are reasonable grounds for Cargill's position; and because the events involve circumstances in which "impartiality may reasonably be questioned," 28 U.S.C. § 455(a), rather than any actual bias; we believe that the Court would want to address these problems at the earliest possible time.

Further, Cargill's local counsel does not believe, given the circumstances, that it is appropriate for it to participate further in this matter. We are therefore in the position of having to advise the Court of our concerns by this letter, in order that the matter may be aired. Depending upon the Court's guidance, it may be appropriate to proceed hereafter by motion, both to give our opponents ample time to reply and to establish a formal record for Cargill's position. We are committed to resolving this matter appropriately, but with an understanding of the distress that events of this nature impart to all participants in the case.

A. Requirement for disqualification and early request of waiver.

There appears to be uniformity that a judge may not maintain consideration of a case where, during its pendency, he or she becomes represented by counsel for a party in that case. Potashnick v. Port City Construction Co., 609 F.2d 1101, 1111 (5th Cir.), cert. denied, 449 U.S. 820 (1980); Texaco, Inc. v. Chandler, 354 F.2d 655, 657 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966); Rapp v. Van Dusen, 350 F.2d 806, 814 (3d Cir. 1965) (en banc); Smith v. Sikorski Aircraft, 420 F. Supp. 661, 662 (C.D. Cal. 1976); Quiñones v. Nettleship, Civil. No. 82-3063 (HL) (D.P.R. Sept. 2, 1983), order reprinted at 595 F. Supp. 589 (judge disqualified himself for two years from cases involving a former law partner who acted as counsel for him).

In other cases, the existence of a lawyer-client relationship between a judge and counsel for a party has been treated as disqualifying, but two factors not present here -- the passage of time or the withdrawal of counsel -- averted recusal. In re Allied Signal, Inc., 891 F.2d 974, 975 (1st Cir. 1989) (representation and financial relationship had ended 8 years before lawsuit in question; another conflict resolved by settlement); In re Georgetown Park Apartments, Ltd., 143 B.R. 557, 560 (Bankr. 9th Cir. 1992) (counsel who had represented judge withdrew from case all matters concerning such counsel transferred to another judge); In re Placid Oil Co., 802 F.2d 783, 786 (5th Cir. 1986) (counsel withdrew from case); Duke v. Pfizer, Inc., 668 F. Supp. 1031, 1036 (E.D. Mich. 1987) (two years had passed since representation); cf In re Snowshoe Co., 137 B.R. 619, 621 (judge unaware of representation).

The disqualifying nature of an attorney-client relationship with the court is based not on any actual finding of bias, but on the premise of 28 U.S.C. § 455 that disqualification depends upon the appearances arising from objective facts. The statute provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" (emphasis added). It is a requirement flowing from Canon 2 of the Code of Judicial Conduct stating that a "judge should avoid . . . the appearance of impropriety in all his activities." See 69 F.R.D. 273, 274.[1/]

The Supreme Court has described the statutory objective as avoidance of even the appearance of partiality, and it has stated that if a reasonable person, knowing the facts regarding the judge's relationships, would question his impartiality, recusal is required. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 861-62 (1988). The First Circuit has explained that Section 455(a) is "automatic, mandatory and self-executing" and that there is no requirement that actual bias be involved, as such is not the test. United States v. Chantal, 902 F.2d 1018, 1023 (1st Cir. 1990). Rather, if there is a factual basis that would give an objective, knowledgeable member of the public a reasonable basis for doubting the judge's

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1/ The Commentary to Canon 2 states:

> A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Code of Judicial Conduct, reprinted at 69 F.R.D. 273, 274.

partiality, disqualification is appropriate. In re United States, 666 F.2d 690, 695 (1st Cir. 1981) (no factual basis).

The courts have no disagreement about the disqualifying nature of a judge being represented by opposing counsel. Most people would instinctively view the selection of legal counsel and the consequent establishment of an attorney-client relationship as creating preferential implications. By his or her action, the judge has displayed a preference for a particular person or firm,[2/] has implicitly endorsed its capabilities and integrity, and is relying upon the firm for the resolution of a personal matter, which may also involve personal financial considerations. A number of private consultations with the firm, protected by privilege, are unavoidable. These factors are "apparently" present regardless of the actual extent of, or involvement of, the representation. Further, when representation is sought in a contested matter, there is no way to determine how extensive it may become, because the course of representation normally depends upon the acts of a third party.

The Court informed the parties at the January 12, 1994 hearing that it called Mr. Petrucceli on December 19, 1993. Mr. Petruccelli should have advised the Court that there was an impediment to his representation in that the Court would be constrained to reassign, at that time, cases involving Petruccelli & Martin that were assigned to the Court, or to seek an immediate waiver by opposing

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2/ The courts have not distinguished between an individual attorney and his or her firm in applying the statue. See e.g., SCA Services, Inc. v. Morgan, 557 F.2d 110, 112 (7th Cir. 1977).

parties to allow the Court's continued consideration of the matters before it. We have no way of knowing whether Petruccelli & Martin was then aware of the aforementioned cases governing this matter, or, instead, confined its thinking to whether the firm had a conflict of interest. It must have been clear, however, that the question of the Court's continuing to act in cases in which Mr. Petruccelli's firm was counsel would naturally arise. Any inquiry into this area would have brought attention to the fact that the Court had under active consideration in this case a very important motion, adverse to clients of Petruccelli & Martin, which would substantially affect the rights of the parties through the entire course of the case. Our opponent's law firm should have advised that the Court could no longer consider that motion.

B. Disclosure of the conflict.

The first time that we, or Cargill, heard about the problem of Judge Carter's being represented by opposing counsel was after the conference on January 12, 1994 -- that is, after our local counsel had already indicated at the conference that it had no objection to the Court's continuing to serve. Thus, when we first heard of the matter, it was presented as a procedural fait accompli and thus raised the question of waiver (whether Cargill had knowingly waived a right). We have researched the matter and believe that there was no waiver. The relevant circumstances are as follows.

We received a call on or about January 10, 1994, from local counsel advising that the Court had scheduled a conference for January 12, 1994 and that local counsel had inquired but was unable to find out the subject matter of the conference. January 10, 1994 was the same day,

according to the Court's remarks on the January 12 transcript, that the Court paid its legal bill to Petruccelli & Martin. We were also advised by local counsel that it had been told that the conference was for local counsel only.

According to the transcript of the conference, on January 12, 1994, our local counsel was advised by the Court that this was "a very simple matter"; that Gerald Petruccelli had been contacted by the Court for representation on December 19, 1993, and had, on December 20, 1993, determined that there was "no impediment" to his representation; that the matter had been favorably resolved on January 7, 1993 and the bill paid at usual rates; that the Court was "morally certain in my own mind" that the series of events would not affect its decisional process; that it was "arguable," "proper" and "perhaps required" that the Court disclose the Petruccelli representation to see if anyone had an objection to the Court's continuing. Opposing counsel immediately stated that he had "absolutely no objection"; defendant's local counsel then stated that there was no objection. The Court went on to say that, for some time, the Court had been dealing with the pending motions and that the Court expected "within a week or so" to "be in a position to file a decision," thus indicating that the decision was being formulated while the conflict was present. Nothing further transpired with respect to this case. (Transcript of Proceedings, January 12, 1994, at pp. 1-3).

We do not believe that our local counsel, with no prior notice of the subject of the conference, being told that it was a simple matter, as to which it had been determined that there was no legal impediment, but that a disclosure might be required nevertheless, without any opportunity to consult with the client or its Washington,

D.C. counsel, and asked to act on the matter in the presence of the Court without opportunity for consideration or consultation, could be held to have given the kind of waiver effective under the statute.[3/]

We do believe that the Petruccelli firm should have advised the Court to make a disclosure to Cargill in December. Moreover, the Court should have afforded adequate time for a considered response (particularly regarding an issue which is not one of frequent occurrence and as to which both legal research and practical consideration is required).

It is not an easy matter for counsel operating in the Court's domain to raise an objection during the course of litigation which goes to the sensitive issue of the Court's actual or apparent partiality. There are unavoidable relational problems inherent in raising such issues. Consequently, such matters should be dealt with in a deliberately protective manner. Addressing the specific issue of waiver under Section 455(a), the Fifth Circuit stated as follows:

> The statute expressly requires the judge to state the reasons for his potential disqualification on the record. If the parties desire to waive the disqualification and consent to his sitting, Advisory Opinion No.

3/ Compare, in Brody v. President & Fellows of Harvard College, 664 F.2d 10 (1st Cir. 1981), cert. denied, 455 U.S. 1027 (1982), the court found the alleged basis for questioning the Court's impartiality to be groundless. It further held that the objection was "waived" by the party's attorney upon disclosure at a pretrial conference, where the "waiver" continued, without further question, throughout the entire trial.

25 of the Advisory Committee on Judicial Activities, which antedates the statute, states a recommended procedure:

> In order that there be no question about the voluntary character of the consent, the Committee reiterates the recommendation contained in *Advisory Opinion No. 20,* namely; that the judge advise counsel at the earliest practicable time, through the clerk of the court or in some other appropriate way, of the reason for his disqualification, and ask counsel to reply in writing to the clerk whether they wish the judge to hear the case or participate in the hearing of an appeal. Unless all parties request the judge to continue, the clerk should not tell the judge which parties did not make such request, and the judge should not act thereafter in the case.

Hall v. Small Business Administration, 695 F.2d 175, 180 n.3 (5th Cir. 1983) (emphasis added).

We do not contend that every element of the recommended procedure is a requirement for a legitimate waiver. Nevertheless, the Advisory Committee's recognition of the need for disclosure at the earliest practical time, with a procedure for consideration and a response in writing, as well as for shielding the parties from the potential implications of confronting a judge as to his or her apparent partiality makes clear, by contrast, why the proceedings of January 12, 1994 placed local counsel in such a position that it could not act considerately with respect to Cargill's position.

C. Timeliness.

A timeliness requirement was specifically rejected in the enactment of Section 455(a).[4/] Nevertheless, most courts have required reasonable timeliness, and we have reviewed the caselaw addressed to this issue. No case suggests that Cargill should have been required to object in the short period between the disclosure on January 12, 1994 and the issuance of the Court's opinion on January 19, 1994 -- a period of one week and, in fact, of only four business days. The cases generally concern delays of months or more and often involve a party's "lying in wait" to receive judgment at the end of the trial or to "sample the court's temper," before raising an objection. See, e.g., In re Anwiler, 958 F.2d 925, 930 (9th Cir.), cert. denied sub nom Anwiler v. Patchett, 113 S. Ct. 236 (1992) (grounds known, but motion made 9 months after oral argument); United States v. Yonkers Board of Education, 946 F.2d 180, 183 (2d Cir. 1991) (applicant had bypassed several opportunities to make motion at earlier stages); Apple v. Jewish Hospital and Medical Center, 829 F.2d 326, 333-334 (2d Cir. 1987) (delays of two and three months); In re International Business Machines Corp., 618 F.2d 923, 932 (2d Cir. 1980) (recusal sought after three years of trial, and trial was still in progress); Molina v. Rison, 886 F.2d 1124, 1131 (9th Cir. 1989) (two years late and after trial); Hall v. Small

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4/ Congress declined to incorporate a timeliness requirement into Section 455 despite the urging of the Justice Department that such a provision would prevent motions from being filed near the close of trial. See 1974 U.S. Code Cong. & Admin. News 6358. Except for the Seventh Circuit, see SCA Services Inc. v. Morgan, 557 F.2d 110, 117-118 (7th Cir. 1977) (per curiam), however, the courts have generally applied a reasonable timeliness requirement for Section 455(a) motions.

Business Administration, 695 F.2d 175, 179 (5th Cir. 1983) (motion proper where brought within one to two months after disclosure); Delesdernier v. Porterie, 666 F.2d 116 (5th Cir.), cert. denied, 459 U.S. 839 (1982) (grounds known at beginning of case; motion first made after 2 full trials); Peckham v. Ron-Rico Corp., 288 F.2d 841, 843 (1st Cir. 1961) (recusal issue not even raised in appeal from order entered after trial); Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987) (delay of six to seven months and following dismissal by summary judgment); In re United Shoe Machinery Corp., 276 F.2d 77, 79 (1st Cir. 1960) (delay of two and one-half years on one issue and 27 unexplained days on another, together with 6 months delay in petitioning Court of Appeals); compare Ricci v. Key Bancshares of Maine, Inc., 111 F.R.D. 369, 376-377 (D. Me. 1986) (motion for recusal "entirely specious" and made as part of scheme to delay trial).

Cargill had no time to "lie in wait" here. To make the point, at the time we or Cargill first heard of this unusual matter, it was already a past act complicated by the issue of waiver. It initially took time to reach and to confer with Cargill's counsel and to obtain its position and authorization to proceed. Further, Rule 11 of the Federal Rules of Civil Procedure required considerable, responsible research and time in order to evaluate what had happened and what Cargill's rights were, and it was obviously necessary to consider the potential consequences of questioning of a judge's actual or apparent partiality and possible alternatives.[5/] Once the Court issued its

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5/ Given the extreme shortness of time (4 business days, because of a federal legal holiday between the conference and release of the Court's

(continued...)

Order a few days later, the very next event that was to involve the Court was the Rule 17(c) conference.

The brevity of the time frame that was involved, we believe, must also be judged in light of the fact that it was occasioned because defendant was not informed in December 1993 of the circumstance that precipitated potential disqualification under § 455(a). Had Cargill been so informed, there would have been a reasonable time to consider its situation fairly.

D. Where the question now stands.

What remains is the result of a situation where the Court had under consideration a very serious and substantial motion made by Cargill during the period of

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5/(...continued)
Order), and the unanticipated nature of the subject matter involved, we do not believe that determination of "timeliness" here depends on the events filling that period. Nevertheless we represent as follows: The undersigned unsuccessfully tried to reach Cargill counsel immediately after being informed of the results of the January 12, 1994 conference, and he, while on travel, tried unsuccessfully to reach me and another lawyer the following day. The first contact with Cargill concerning the January 12 conference occurred on Friday, January 14th, when Cargill counsel talked to an associate in this office and decided that I, then engaged and out of the office, should speak with him at the first of the week. (I was also engaged in an educational conference the entirety of the weekend.) On the ensuing legal holiday Monday, our offices were closed. I spoke with Cargill counsel, for the first time, on Tuesday, January 18, and I undertook to pursue the matter. After the Order was issued on Wednesday, January 19, 1994, consideration of it displaced all other activity. (Further, because of the legal holiday on January 17 and ensuing winter storms, our office and federal and local government offices were totally shut down or had reduced staff from Monday, January 17, 1994 through Thursday, January 20, 1994; we had limited resources available throughout.)

apparent conflict; should have been advised by opposing counsel to reassign the matter or to seek a waiver in December 1993; was apparently not so advised and did not act until the day it paid its account on January 10, 1994; called a conference without disclosure of subject matter, for local counsel only, to be held two days later; characterized the issue as a simple matter, already determined and involving a moral certainty of impartiality; received local counsel's lack of objection on the spot; and rendered a decision a week later that is objectively controversial because inter alia it adopts a clear minority viewpoint on the important issue of antitrust standing.[6/]

We do not believe that the Court, knowing the precedent bearing on the matters here in issue, would have or should have continued its involvement or rendered the decision. We do believe that the Court should withdraw its Order and reassign the case. Preston v. United States, 923 F.2d 731, 735 (9th Cir. 1991); Potashnick v. Port City Construction Co., 609 F.2d at 115 (ordering retrial and noting that the "unfairness and expense which results" can only be avoided by acceptance of disqualification requirements); see also Liljeberg, 486 U.S. at 868 (retrial).

Cargill also proposes, as has been discussed with opposing counsel, to move that the Court's Order of January 19, 1994 be certified by it for immediate appeal pursuant to 28 U.S.C. § 1292(b). We hope to obtain such counsel's support of that motion, but the matter remains under his consideration.

6/ See Rodriguez v. Banco Cent., 917 F.2d 664, 665 (1st Cir. 1990) (Breyer, C.J.).

Again, we express our regret that the circumstances have unfolded as they have, but we do feel compelled to address this matter so that it does not underlie and silently affect, in some way, the parties' conduct of the case.

Sincerely yours,

/s/

Bernhardt K. Wruble

cc: Daniel Bates, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Frederick Ashmore, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 93-199-P-C
Northeast Petroleum Division of Cargill, Inc., et al.,	)	
Defendant.	)	

AFFIDAVIT OF BERNHARDT K. WRUBLE

BERNHARDT K. WRUBLE recites as follows:

1. I am a member of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, counsel for Cargill, Incorporated ("Cargill"), defendant herein. I am principally responsible for Cargill's representation in the captioned matter.

2. On January 11, 1994, I received a call from John O'Leary, of Pierce, Atwood, Scribner, Allen, Smith & Lancaster, Cargill's local counsel in this matter. He advised that the Court had scheduled a conference on January 12, 1994 for local counsel only and that Mr. O'Leary could not find out the subject matter, despite querying the clerk's office.

3. On January 12, 1994, I received another call from Mr. O'Leary in which he summarized the principal points of what appears in the court reporter's transcript of that conference, as it pertains to Cargill.

4. I then telephoned counsel at Cargill to inform him of this matter and to obtain guidance and authority. He was unavailable and was also reported as on or to be on business travel. I left a message asking that he call me. Further, when my colleague here, Chriss Wetherington, returned to the office on Thursday, January 13, 1994, I advised her of the foregoing events. Because I was committed to be out of the office on Friday, January 14, 1994, and throughout the weekend at an educational seminar, I asked Ms. Wetherington to stand ready to receive the call of Cargill's counsel and to brief Cargill on the matter.

5. Ms. Wetherington advised me that she had a conversation with Cargill's counsel on the matter on Friday and that I was to speak with him at the beginning of the week.

6. On Monday, January 17, 1994, this office was closed by reason of a federal holiday, and further a storm that started that day and lasted virtually throughout the week periodically closed our office or caused it to operate with reduced facilities and personnel through Thursday, January 20, 1994 -- as it did the local and federal governments (closed some days and on "liberal leave" others). Nevertheless, I was able to discuss the matter with Cargill on Tuesday, January 18, 1994. Without relating the substance of that conversation, which is privileged, I will say that I left it with a plan to pursue the disqualification problem. The immediately ensuing

decision of the Court on Wednesday, January 19, 1994, however, captured our full attention for a period of time in order to assess its implications and Cargill's course of action. We then turned to the disqualification problem with the idea that action, if merited, needed to occur before the scheduled Local Rule 17(c) conference.

/s/
Bernhardt K. Wruble

SUBSCRIBED and SWORN TO before me this 7th day of March, 1994.

/s/ Ione Hartl
NOTARY PUBLIC

My Commission Expires:

7/31/95

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Frederick Ashmore, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 93-199-P-C
Northeast Petroleum Division of Cargill, Inc., et al.,	)	
Defendant.	)	

AFFIDAVIT OF CHRISS B. WETHERINGTON

Chriss B. Wetherington, being duly sworn, deposes and says.

1. I submit this affidavit in connection with the motion of defendant Cargill, Inc. ("Cargill") for recusal. I am fully familiar with the facts recited below. At the time of the events in question I was a lawyer associated with the firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, counsel for Cargill in this matter.

2. I was out of town and not in the office on Wednesday, January 12, 1994. On the following day, Thursday, I was in the office and had a short conversation with Bernie Wruble, who was chiefly responsible for the firm's representation in this case. He stated that he had

had a conversation with John O'Leary, Esq., local counsel for Cargill, the preceding day, which I will summarize without purporting to cover every point and will omit legal discussions and characterizations.

3. Mr. Wruble reported that Mr. O'Leary had advised him that in a short conference, the Judge had stated that he had been represented by our opponent's law firm on a matter related to a real estate transaction; that the Judge had said that he was morally certain that he could handle the case anyway; that Mr. O'Leary stated that he did not object; that the Judge said he was going to rule on our pending motion in a week or so; and that Mr. O'Leary thereafter had called us. Mr. Wruble stated that he had telephoned Mike Young (the attorney at Cargill responsible for this case) on Wednesday but was unable to reach him because Mr. Young was otherwise engaged and in transit, and Mr. Wruble thus had left a message. Mr. Wruble stated that because he was committed to be out of the office all day on Friday and engaged in a seminar all weekend, I should be available for Mr. Young's return call to inform him of the foregoing.

4. On the next day, Friday, January 14, 1994, in the afternoon, I received a call from Mr. Young, who had first tried to reach Mr. Wruble. I described to him the aforesaid matters. I will not recite here matters in that conversation which might, in any way, compromise attorney-client privilege; but I will state that in light of Mr. Young's reaction, I said that he and Mr. Wruble should talk at the beginning of next week. I subsequently communicated with Mr. Wruble on Mr. Young's telephone call.

/s/
CHRISS B. WETHERINGTON

Subscribed and sworn to before me this 24th day of February, 1994.

/s/ June Todd
Notary Public

My Commission Expires August 31, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FREDERICK ASHMORE, DAVID BOYA, WILLIAM SIMONE, AND RICHARD SIMEONE,	)	
Plaintiffs,	)	
v.	)	Case No. 93-199-P-C
NORTHEAST PETROLEUM DIVISION OF CARGILL, INC., NORTHEAST PETROLEUM CORPORATION OF MAINE, NORTHEAST PETROLEUM CORPORATION OF CAPE COD, d/b/a NORTHEAST PETROLEUM, AND CARGILL, INC.	)	
Defendant.	)	

AFFIDAVIT OF JOHN J. O'LEARY, JR.

NOW COMES John J. O'Leary, Jr., who deposes and states as follows:

1. My name is John J. O'Leary, Jr. I make these statements of my own personal knowledge, under oath.

2. I am a member of the law firm of Pierce, Atwood, Scribner, Allen, Smith & Lancaster, located at One Monument Square, Portland, Maine ("Pierce Atwood").

3. On behalf of Pierce Atwood, my partner Charles S. Einsiedler, Jr. and I have served as local counsel for defendant Cargill, Inc. and its unincorporated divisions (collectively, "Cargill") in this action.

4. The law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, located in Washington, D.C. ("Verner Liipfert"), has represented Cargill in this action as its principal counsel and Bernhardt K. Wruble and Chriss Wetherington of that firm have been granted leave to appear and practice in this Court as visiting lawyers.

5. Plaintiffs are represented in this matter by Daniel W. Bates and Kenneth D. Keating of the law firm of Petruccelli & Martin, located at 50 Monument Square, Portland, Maine.

6. On January 11, 1994, I received a telephone call from the clerk's office for the United States District Court, informing me that Chief Judge Carter had scheduled a conference in this matter for January 12, 1994.

7. The clerk's office informed me that Chief Judge Carter had specified that the conference was for local counsel only, and I conveyed this information to Mr. Wruble before the January 12 conference.

8. During the course of the initial phone call with the clerk's office or in a follow-up call with the clerk's office, I attempted to learn the subject matter of the conference. I was unable to do so, and I conveyed this information to Mr. Wruble before the January 12 conference.

9. Accordingly, neither representatives of Cargill nor Verner Liipfert attended the conference on January 12, 1994. I attended the conference with Mr. Einsiedler.

10. I first learned of Petruccelli & Martin's representation of Chief Judge Carter through his disclosure at the conference on January 12, 1994.

11. On January 12, immediately after the conference, Mr. Einsiedler and I conveyed what had transpired to Mr. Wruble by telephone, and in that telephone conversation Mr. Wruble said he would contact Cargill.

DATED: March 8, 1994

/s/
John J. O'Leary, Jr.
Federal Bar Rule No. 100

STATE OF MAINE
CUMBERLAND, ss. March 8, 1994

Before me appeared John J. O'Leary, Jr., to me personally known, who, being by me duly sworn, did

swear that the statements in the foregoing Affidavit by him subscribed are true to the best of his knowledge and belief.

/s/ Heather Jayne Stevens
Notary Public
Heather Jayne Stevens
Notary Public, Maine
My Commission Expires
October 26, 1995

Supreme Court, U.S.
FILED
MAR 22 1996
CLERK

No. 95-1327

In The

Supreme Court of the United States

October Term, 1995

IN RE CARGILL, INCORPORATED,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can the Petitioner, seeking recusal of a district court judge, sustain its heavy burden of demonstrating that there are "special and important reasons" to grant review on writ of certiorari where the Petitioner expressly waived any objection to the judge's continuing to preside, where the Petitioner "lay in wait" following its waiver until after an adverse decision on the merits to seek the judge's recusal, and where partiality is not demonstrated?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Statement of Facts	2
Reasons For Denying the Writ	5
I. The Opinion of the Court of Appeals Was Proper, and in Conformance With Applicable Law.	5
II. The District Court Judge Conformed His Actions Meticulously to 28 U.S.C. § 455(e)	7
III. Proper Denial of a Writ of Mandamus Because of Petitioner's Failure to Sustain its Burden Does Not Constitute an "Abdication" of the Court's Powers, as Petitioner Suggests, But Rather a Proper Exercise of Them.	13
IV. "Issues of Timing" Do Not Render the Court of Appeals' Decision Improper	17
V. The Opinion of the Court of Appeals Does Not Conflict With the Holding in *Liljeberg* on Matters of Remedy	18

Contents

	Page
VI. The Issues Presented Do Not Justify Certiorari Review	20
Conclusion	20

TABLE OF CITATIONS

Cases Cited:

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 66 L. Ed. 193, 101 S. Ct. 188 (1980) 17

Apple v. Jewish Hosp. & Medical Ctr., 829 F.2d 326 (2nd Cir. 1987) 18

Ashmore v. Northeast Petroleum, Division of Cargill, Inc., 843 F. Supp. 759 (D. Me. 1994) 4

Blizard v. Frechette, 601 F.2d 1217 (1st Cir. 1979) 8, 9

Brody v. President & Fellows of Harvard College, 664 F.2d 10 (1st Cir. 1981) *cert. denied*, 445 U.S. 1027 (1981) 9, 13

Cabana v. Cruz, 595 F. Supp. 585 (D.P.R. 1984) 21

Duke v. Pfizer, Inc., 668 F. Supp. 1031 (E.D. Mich. 1987) 19

E & J Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280 (9th Cir. 1992) 14, 17

Contents

Page

El Fenix De Puerto Rico v. M/Y Johanny, etc. et al., No. 93-1493 slip op. at p. 13 (1st Cir. September 26, 1994) 18, 19

Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 466 U.S. 972, 104 S. Ct. 2347, 80 L. Ed. 2d 820 (1984) 10

Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983) 12

In re Allied Signal, Inc., 891 F.2d 974 (1st Cir. 1989) .. 19

In re Cooper, 821 F.2d 833 (1st Cir. 1987) 9, 10

In re Georgetown Apartments, Ltd., 143 B.R. 557 (9th Cir. BAT 1992) 10

In re Petitioner, Inc., 66 F.3d 1256 (1st. Cir. 1995) 5

In re Union Leader Corp., 292 F.2d 389 8

In re United Shoe Machinery Corp., 276 F.2d 77 (1st Cir. 1960) 14

In re United States, 666 F.2d 690 (1st Cir. 1981) 6, 8, 9, 10

Kerr v. United States District Court, 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976) 6

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 18, 19

Contents

Page

Panzardi-Alvarez v. United States, 879 F.2d 983 (1st Cir. 1989) 8, 10

Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986) *cert. denied*, 481 U.S. 1016 (1987) 18

Preston v. United States, 923 F.2d 731 (9th Cir. 1991) 14

Ricci v. Key Bancshares of Maine, Inc., 111 F.R.D. 369 (D. Me. 1986) 16

Russell v. Lane, 890 F.2d 947 (7th Cir. 1989) 19

United States v. Burger, 964 F.2d 1065, *on remand*, 809 F. Supp. 851 (10th Cir. 1992) 8, 9

United States v. Cowden, 544 F.2d 257 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977) 8, 9

United States v. Kelly, 519 F. Supp. 1029 (D. Mass. 1981), *mandamus denied, In re United States*, 366 F.2d 690 ..... 13, 14

United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985) 19

United States v. Nobel, 699 F.2d 231 (3rd Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983) 12, 14

Contents

Page

Statutes Cited:

28 U.S.C. § 455 ..... 7, 8, 9, 13, 17, 18

28 U.S.C. § 455(a) 1, 6, 7, 11, 13, 18, 19

28 U.S.C. § 455(e) 1, 2, 6, 7, 11, 13, 14

Rules Cited:

Supreme Court Rules:

Rule 10 7

Rule 60(b)(6) 19

Federal Rule of Appellate Procedure 21(b) 5

Other Authorities Cited:

Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736 (1973) 9

Respondents Frederick Ashmore, David Boya, William Simone, and Richard Simeone, ("Respondents") respectfully pray that the writ of certiorari sought by Petitioner Cargill, Inc., be denied.

STATEMENT OF THE CASE

Rather than air the merits of its doubtful defense in a trial, Cargill (hereinafter "Petitioner") has sought, for two years, to translate its own entrenched theories about the law of recusal and waiver into favorable review. In the face of proper denials of its petitions at every turn, the Petitioner here again tries to mischaracterize a small and transitory event as a need to save the national fabric from disintegration. Despite the sensational flourishes with which the Petitioner embellishes its attempt, it has shown no special or important reason for review.

This Court should deny Petitioner's Petition for Writ of Certiorari for three separate reasons: First, the undisputed facts and circumstances surrounding Attorney Petruccelli's brief and discrete representation of the district court judge in an unrelated matter do not rise to the level at which his "impartiality might reasonably be questioned" under the standard of 28 U.S.C. § 455(a). Second, Petitioner expressly waived any objection to the district court judge's continuation in this matter after his full disclosure pursuant to 28 U.S.C. § 455(e). Third, the untimeliness of Petitioner's motion for recusal again waived any objection to the district court judge's continuing to preside over this matter. Without regard to these issues, the district court's order denying Petitioner's motion to dismiss dated January 19, 1994 must stand and remain effective under current law, since Petitioner has not established that enforcement of that order would be unjust.

STATEMENT OF FACTS

Respondents Frederick Ashmore, David Boya, Richard Simeone and William Simone (hereinafter "Respondents") filed suit in the federal district court in the District of Maine against Petitioner on July 23, 1993, seeking damages pursuant to the Robinson-Patman Antidiscrimination Act (hereinafter "Robinson-Patman Act") and under common law theories of breach of contract and promissory estoppel. The Respondents have alleged that they were wrongfully fired by Petitioner because of their reluctance and/or outright refusal to engage in anti-competitive activities prohibited by the Robinson-Patman Act. On September 2, 1993, Petitioner filed a motion to dismiss arguing that the Respondents lacked standing to maintain an action under the Robinson-Patman Act.

On January 12, 1994, a conference was held during which the district court judge informed counsel of record for all parties that he had recently retained the services of Attorney Gerald F. Petruccelli, a partner in the law firm representing the Respondents in this action. Both parties participated in this conference, Petitioner through its attorneys of record, John J. O'Leary, Jr. and Charles S. Einsiedler, Jr., and Respondents through their attorneys of record, Daniel W. Bates and Kenneth D. Keating. Contrary to Petitioner's assertion of factual interpretation, the district court complied with 28 U.S.C. § 455(e).

At that conference, the district court judge disclosed that he became involved in a "minor controversy" regarding a purchase and sale of a new house on December 19, 1993. Transcript of January 12, 1994 Conference of Counsel (App. 34a). On December 19, the district court judge telephoned Attorney Petruccelli seeking advice and representation, and on December 20 Attorney Petruccelli accepted that representation. The

district court judge has since indicated that he was not "consciously aware" that the law firm of Petruccelli & Martin was involved in this matter until the Clerk so informed him after Attorney Petruccelli had undertaken to represent the district court judge. Memorandum of Decision and Order dated May 12, 1994 (App. 57a). The district court judge and Mr. Petruccelli met on December 21 "for about 45-50 minutes" during which time the district court judge indicated that he sought a "quick resolution" to the matter. App. 34a. At the conference of counsel, the district court judge indicated that there had been phone conversations between himself and Attorney Petruccelli on December 22, 23, 28 and 29 of "four or five minutes a piece." App 34a. The district court judge further disclosed that "the matter was resolved to my satisfaction" on January 6, 1994. App. 34a. Attorney Petruccelli immediately rendered a bill reflecting "the usual rate, usual fee computed at the usual hourly rate for the hours of devotion to the case that he would charge to any stranger off the street." App. 34a-35a. On January 10, the bill was paid in full. App. 35a. Following this disclosure, Respondents, by and through their attorney of record, waived any objection to the district court judge's continued participation in the case. The district court judge then indicated that he had never had any conversation about that representation with Attorney Bates or Attorney Keating. App. 35a. Immediately thereafter, Petitioner, by and through its counsel of record, also waived any right that it may have had to object to the district court judge's continuing to preside in this matter. (Attorney O'Leary, an experienced litigator and partner at the law firm of Pierce, Atwood, Scribner, Allen, Smith & Lancaster, and counsel of record for Petitioner, stated: "[s]peaking for the defense, there is no objection." App. 35a). The court then indicated that it intended to issue a decision on Petitioner's motion to dismiss "within a week or so." App. 36a.

This conference took place on January 12, 1994.

Immediately after it, Attorney O'Leary telephoned Attorney Bernhardt Wruble, who also represents Petitioner, to summarize the conference (*see* Affidavit of Attorney O'Leary, App. 102a). Despite the fact that Attorney O'Leary, Attorney Einsiedler and Attorney Wruble all were aware on January 12, 1994 that the district court judge, relying on Petitioner's waiver, intended to issue a substantive order regarding Petitioner's motion to dismiss as early as within one week, not one of them ever objected or gave any notice to the court or the Respondents disputing the validity and effectiveness of its waiver, or seeking its withdrawal.

As it had predicted, the district court issued a "Memorandum of Decision and Order Denying Defendants' Motion to Dismiss" within a week of the conference, on January 19, 1994.[1] However, it was not until *February 13, 1994*, over one month after Petitioner's waiver of objections at the conference and three weeks after the court's issuance of the order denying Petitioner's motion to dismiss, that Petitioner notified the district court of its intention to challenge the validity of its waiver and to seek the recusal of the district court judge.

On February 15, 1994, Attorney O'Leary filed a motion for leave to withdraw from this matter. Then, on February 25, Petitioner filed a motion to certify for interlocutory appeal the January 19, 1994 order denying Petitioner's motion to dismiss. On March 9, 1994, Petitioner filed a formal motion seeking the district court judge's recusal and moving the court to vacate its January 19, 1994 order denying Petitioner's motion to dismiss.

By order dated May 12, 1994, the district court denied

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1. Although Petitioner repeats several times its assessment that this order is unsupported by applicable legal authority, this is not so. *See Ashmore v. Northeast Petroleum, Division of Cargill, Inc.*, 843 F. Supp. 759 (D.Me. 1994).

Petitioner's motion for recusal (App. 55a) and by order dated June 21, 1994, the court denied Petitioner's motion to certify the court's January 19 order denying Petitioner's motion for dismissal for interlocutory appeal. Only on *July 19, 1994*, did Petitioner file the petition for writ of mandamus with the Court of Appeals seeking the district court judge's recusal and the withdrawal of the order of January 19, 1994 denying Petitioner's motion to dismiss. Following this, on August 2, 1994, Petitioner filed a motion to transfer this action to the District of Massachusetts. Respondents timely objected to the motion. The district court has taken no action on this matter since that time.

On November 23, 1994, the district court judge notified this court pursuant to Fed.R.App.P. 21(b) that he would not appear in the mandamus proceeding and that he stood by his decision on Petitioner's motion for recusal entered on May 12, 1994.

Respondents opposed Petitioner's petition for writ of mandamus. The Court of Appeals denied the petition for writ of mandamus at *In re Petitioner, Inc.*, 66 F.3d 1256 (1st Cir. 1995) (App. 14a). Upon Petitioner's petition for rehearing en banc, the Court of Appeals denied the writ of mandamus on November 16, 1995 (App. 12a).

REASONS FOR DENYING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS WAS PROPER, AND IN CONFORMANCE WITH APPLICABLE LAW.

Because prerogative writs unsettle the mechanics of the judicial system by accelerating appellate intervention, fostering piecemeal review and disturbing the historic relationship

between trial and appellate courts, (App. 20a) the Court of Appeals properly held that the Petitioner did not meet the high standard for issuance of a writ of mandamus. Petitioner showed "neither that it is clearly and indisputably entitled to the writ nor that it faces an intolerable risk of irreparable harm" by denial of the writ. (App. 22a). The court held that the judge conformed to the requirements of 28 U.S.C. §§ 455(a) and (e) and that local counsel's waiver was ratified by Petitioner's silence and inaction after learning of it. (App. 23a). Far from being in conflict on the point, the circuits are in harmony:

> After all, it is common ground that civil litigants ordinarily are bound by their attorneys' tactical judgments" *see, e.g. Brody v. President & Fellow of Harvard Coll*, 664 F.2d 10, 12 (1st Cir. 1981) (holding, on particular facts, that client would not be allowed "to second guess his attorney's waiver") *cert. denied*, 455 U.S. 1027 (1982), and waivers based on silence are standard fare, *see e.g., United States v. Nobel*, 696 F.2d 231, 237 (3d Cir. 1982) (finding waiver under § 455(e) based on party's failure to make a timely objection once the basis for disqualification was fully disclosed), *cert. denied*, 462 U.S. 1118 (1983).

The contested waiver was thus of both local and lead counsel, and properly led to a finding that Petitioner did not demonstrate the "clear and indisputable" right to relief necessary for entitlement to a writ of mandamus. *In re United States*, 666 F.2d 690 (1st Cir. 1981) (citing *Kerr v. United States District Court*, 426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976)).

This proper conclusion leads to a second conclusion here: that Petitioner fails to satisfy the standard for writ of certiorari. There are no special or important reasons for the granting of such a writ. None of the illustrations in Supreme Court Rule 10 are implicated by the facts or lower court decisions here. No conflicts in lower court decisions seriously justify review. On the contrary, the meritless and transitory reasons for review argued by Petitioner in this case cannot establish the degree of public importance or need for prompt resolution necessary for such review. The petition requested should be denied on this basis.

II.

THE DISTRICT COURT JUDGE CONFORMED HIS ACTIONS METICULOUSLY TO 28 U.S.C. § 455(e).

Title 28 U.S.C. § 455 governs the disqualification of district court judges. § 455(a) provides that: "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This court has previously held that the proper analysis under § 455(a) depends upon:

> whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of the reasonable man.

Panzardi-Alvarez v. United States, 879 F.2d at 983 (1st Cir. 1989)

(quoting *United States v. Cowden*, 544 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977)).

In concert with other circuits, the First Circuit has repeatedly warned that § 455 is not a device for parties to use in an effort to select a judge of their choosing. *See United States v. Cowden*, 545 F.2d at 265.

> [D]isqualification is appropriate *only* if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. Were less required, a judge could abdicate in difficult cases at the mere sound of controversy or a litigant could avoid adverse decisions by alleging the slightest of factual bases for bias. *See* H.Rep.No. 1453, 1974 U.S. Code Cong. & Admin. News, *supra*, at 6355. This restricted mandate to disqualify is calculated to induce a judge to try the narrow path between timidity and tenacity.

In re United States, 666 F.2d at 690-691 (emphasis added). The law is clear that "a judge must be presumed to be qualified, and there must be a substantial burden upon the affiant to show grounds for believing the contrary." *In re Union Leader Corp.*, 292 F.2d at 389. Furthermore, "a trial judge must hear cases unless some reasonable factual basis to doubt the impartiality or fairness of the tribunal is shown by some kind of probative evidence." *Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979). "There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *In re Union Leader Corp.*, 292 F.2d at 391. *See also United States v. Burger*, 964 F.2d 1065, *on remand*, 809 F.

Supp. 851 (10th Cir. 1992). "[A] judge once having drawn a case should not recuse himself on an unsupported, irrational, or highly tenuous speculation; were he or she to do so, the price of maintaining the purity of appearance would be the power of litigants or third parties to exercise a negative veto over the assignment of judges." *In re United States*, 666 F.2d at 694. "Litigants are not entitled to have a judge disqualify himself merely because they fear an adverse decision." *United States v. Cowden*, 545 F.2d at 257. *A fortiori*, a litigant is not entitled to recusal because the judge has made an adverse decision.

The same standard applies even when the judge has had some ties to a party or its counsel. "The mere association of a judge with a party, without indication that the judge stands to obtain financial or other gain from a particular outcome, may similarly be insufficient to mandate disqualification." *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981) *cert. denied*, 455 U.S. 1027 (1981). Furthermore, "where the interest asserted bears only a tangential relationship to the subject matter of this suit, the alleged bias is even further attenuated." *Id.* at 12 (citing *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 754 (1973)). Adverse evidentiary rulings do not by themselves demonstrate impermissible bias. *Blizard v. Frechette*, 601 F.2d at 1222. Furthermore, a mistake of law is not evidence of bias. *In re Cooper*, 821 F.2d 833, 843 (1st Cir. 1987) (*per curiam*). "As the terms of section 455's additional explicitly mandated bases for recusal suggest, a reasonable suspicion of bias will usually arise only in the presence of such factors as a financial or strong personal interest in one of the *litigants*." *Brody v. President & Fellows of Harvard College*, 664 F.2d at 11 (emphasis added).

> The statutory standard puts to the judge a question about the objective state of the legal and lay culture. The Court must consider

> whether an astute observer in either culture would conclude that the relation between judge and lawyer (a) is very much out of the ordinary course, *and* (b) presents a potential for actual impropriety if the worst implications are realized.

In re Georgetown Apartments, Ltd., 143 B.R. 557, 559 (9th Cir. BAT 1992) (emphasis added).

Petitioner does not in fact claim that the district court judge is partial to the Respondents: only that there is the appearance of partiality to Attorney Petruccelli. A bias toward or against an attorney does not require disqualification of the judge in the absence of a showing of bias for or against a party. *See In re Cooper*, 821 F.2d at 839; *also see Gilbert v. City of Little Rock*, 722 F.2d 1390, 1398-1399 (8th Cir. 1983), *cert. denied*, 466 U.S. 972, 104 S. Ct. 2347, 80 L. Ed. 2d 820 (1984). This court has stated that situations in which a bias against an attorney would suggest a bias against that attorney's clients are "rare" and happen only under "exceptional circumstances." *In re Cooper*, 821 F.2d at 839. "As a general rule, bias against a party [as opposed to a party's lawyer] must be shown." *Panzardi-Alvarez v. United States*, 879 F.2d at 9.

> Even, however, if one may assume the survival of some residue of gratitude after such a period, it is beyond contemplation that such gratitude would be of the weght necessary to cause a judge to jettison his impartiality and, in open court day after day to violate his deepest professional and ethical commitments as a judge.

In re United States, 666 F.2d at 696.

Petitioner's argument comes down to this: the fact that the district court judge retained Attorney Petruccelli to represent him in a very minor controversy would suggest to a reasonable person a clear and unmistakable favorable bias toward Attorney Petruccelli; this bias would then translate into a clear and unmistakable bias in favor of every member of the firm of Petruccelli & Martin; and this bias would in turn translate into a clear and unmistakable bias in favor of each client of any member of the firm of Petruccelli & Martin. To state the heart of Petitioner's position in this form is to refute it.

No reasonable person could or would consider Attorney Petruccelli's brief representation as creating an appearance of partiality inuring to the benefit of Attorney Petruccelli's partners' clients. The cases are undivided in supporting Respondents' position that it was not an abuse of discretion for the district court judge to deny Petitioner's motion for recusal.

The law is also clear that in a situation in which the only potential basis for recusal is that a judge's impartiality might reasonably be questioned (§ 455(a)), a judge may continue to preside over a case if the parties waive any objections following a full and complete disclosure of the facts surrounding the potentially disqualifying issue. Title 28 U.S.C. § 455(e).

The facts of the waiver are undisputed. At the January 12, 1994 conference of counsel, Petitioner was represented by Attorney O'Leary and Attorney Einsiedler, both experienced litigators and partners in Maine's largest law firm, Pierce, Atwood, Scribner, Smith, Allen & Lancaster. There has been no suggestion that Petitioner's counsel lacked legal competency. Nor is there any serious argument that the district court judge failed to fully disclose all relevant facts and circumstances concerning the representation by Attorney Petruccelli of the district court judge. After that disclosure, Attorney O'Leary

stated: "[s]peaking for the defense, there is no objection." (App. 35a).[2]

Unable to avoid the fact of the waiver, Petitioner questioned the adequacy of the district court judge's disclosure. But "[a] judge is required merely to disclose the basis for disqualification, not every incident or factual detail which might contribute to the overall impression of partiality." *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983). "The statute in its present form, unlike the code of judicial conduct, does not regulate the detailed manner in which the waiver must be effected." *United States v. Nobel*, 699 F.2d 231, 236-237 (3rd. Cir. 1982) *cert. denied*, 462 U.S. 1118 (1983). Judged by that standard, there can be no serious argument that the district court judge's disclosure was inadequate in any way. Furthermore, the record is clear that Attorney O'Leary did not seek any further detail before he stated that his client had no objection.

The district court judge did not prevent counsel from having an opportunity to confer with their client outside the presence of the court. Indeed, the judge indicated that he fully intended to give the parties an opportunity to consider the issue, but in fact both counsel voluntarily and unequivocally announced that they had no objection to the district court judge continuing to preside. Because of counsels' consent, there was no longer any need to discuss how much time was needed for consultation.

Petitioner's statement that "Petitioner's local counsel can

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2. Petitioner appears to suggest that the action of a party's "local" counsel does not become effective and binding upon the party until that action has been formally ratified by every other attorney representing that party and by the party itself. Petitioner has failed to support this novel proposition with any statute or case. Further, the First Circuit Court of Appeals found ratification from Petitioner's lengthy inactivity following the full disclosure and waiver.

hardly be viewed as having given an effective, authorized waiver" is unsupported by the facts, by 28 U.S.C. § 455(e), or by any case. If Petitioner has any dispute as to the adequacy of its representation, the tactical decisions made by its counsel, or the extent of his authority, it must take up those issues with its former counsel at a different time and place. A party is bound by the actions and decisions of its counsel. *Brody v. President & Fellows of Harvard College*, 664 F.2d at 12. ("Even if the judge's education were a subject required to be disclosed by § 455(a), it is too late for appellant to second guess his attorney's waiver; litigants are ordinarily bound by their attorney's tactical decisions."). Petitioner has cited no authority to suggest otherwise.

III.

PROPER DENIAL OF A WRIT OF MANDAMUS BECAUSE OF PETITIONER'S FAILURE TO SUSTAIN ITS BURDEN DOES NOT CONSTITUTE AN "ABDICATION" OF THE COURT'S POWERS, AS PETITIONER SUGGESTS, BUT RATHER A PROPER EXERCISE OF THEM.

The Petitioner below failed to meet its burden because it showed neither a clear entitlement to relief nor a favorable balance of equities. (App. 22a). In doing so, it properly characterized Petitioner's failure to act as a waiver.

Although there is no specific timing requirement within Title 28 U.S.C. § 455, courts have repeatedly held that motions for recusal must be made in a timely manner. "The law is well settled that one seeking the disqualification of the judge must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *United States v. Kelly*, 519 F. Supp. 1029, 1051 (D. Mass. 1981),

mandamus denied, In re United States, 366 F.2d at 690. "[A] party, knowing of a ground for requesting disqualification, can not be permitted to wait and decide whether he likes subsequent treatment that he receives." *In re United Shoe Machinery Corp.*, 276 F.2d 77, 79 (1st Cir. 1960). Courts must be vigilant to insure that litigants are not allowed to "use recusal motions for strategic purposes." *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991); *see also E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992).

In *United States v. Nobel*, 699 F.2d at 231, the trial court put counsel on notice of a potential appearance of partiality. The disgruntled party argued on appeal that the court's disclosure was inadequate. The Third Circuit Court of Appeals wasted little time in dispensing with this issue. Noting that counsel made no request for additional information, the court stated that "the information disclosed was sufficient to put defense counsel on notice of the relationship between the judge and the INA." *Id.* at 236. The court then held that under such circumstances, counsel's "*failure to object* constitutes a waiver of disqualification covered by § 455(e)." *Id.* at 236 (emphasis added).

In this case, a conference of counsel was noticed on January 11, 1994, for the following day. At that conference, the district court judge advised Attorneys Bates and Keating, on behalf of Respondents, and Attorneys O'Leary and Einsiedler, on behalf of Petitioner, of the facts concerning the brief representation by Attorney Petruccelli. Respondents and Petitioner then voluntarily and unequivocally stated that there was no objection to the district court judge's continuing to preside over this matter. Immediately thereafter, the district court judge informed counsel for both parties that the decision on Petitioner's motion for dismissal would be issued within the next week or so.

It is undisputed that on that same day (January 12, 1994), Attorney O'Leary notified Attorney Wruble of (1) the district court judge's disclosure, (2) Petitioner's express waiver, and (3) the likely issuance of a decision on Petitioner's motion to dismiss as soon as one week thereafter. (App. 95a, 102a). Prior to January 19, 1994, the date of the district court's decision denying Petitioner's motion to dismiss, neither the court nor Respondents received any notice whatever from Petitioner that there was even the possibility of a dispute as to the adequacy or legitimacy of Petitioner's waiver. Then, on *February 13, 1994*, Attorney Wruble mailed a detailed "letter" to the court demanding the district court judge's recusal and demanding that the district court judge withdraw his order denying Petitioner's motion to dismiss.

Despite Petitioner's excuses ("snowstorm" and "federal holiday"), it is clear that Petitioner had ample opportunity to communicate, by phone if nothing else, with the clerk at least to put the court on notice that it wanted a chance to consider revoking its express waiver. Even though it was fully aware that the district court judge would be issuing a substantive decision within the next week or so, Petitioner chose to remain silent for several weeks, await the district court judge's ruling, and then notify the court that it disputed the validity of its counsel's waiver. Despite its current protests to the contrary, Petitioner need not have filed a complete brief immediately; it needed only to notify the court that there was an issue regarding the adequacy of its counsel's waiver. It did not do so. As Judge Aldrich has said:

> A judge cannot be acceptable if he finds in your favor, but unqualified if he finds against you. This is classic heads-I-win, tails-you-lose. It was not improper to file a motion for reconsideration, but it was totally improper

> procedure to present it while consciously reserving recusal as an ace in the hole. . . .

Ricci v. Key Bancshares of Maine, Inc., 111 F.R.D. 369, 377 (D. Me. 1986) (Aldrich, J.).

The crucial issue in these cases is whether the party having the knowledge has attempted to use that knowledge to manipulate the system in order to allow it two bites at the apple. The Court of Appeals found that Petitioner may well have done so, though this finding is not essential to its finding that Petitioner twice waived its right to protest. Attorney O'Leary, Attorney Einsiedler and Attorney Wruble all knew on January 12, 1994 that the district court judge had raised the issue of recusal. They knew, too, that Petitioner had waived any objection to the district court judge's continuing to preside and that the district court judge would be issuing a substantive decision on Petitioner's motion to dismiss as early as a week later. Indeed, Petitioner has never even alleged or asserted that it decided to move for recusal prior to receiving the January 19, 1994 decision denying Petitioner's motion for dismissal. Such post-hoc reversal of a tactical decision is precisely what the law does not countenance.

Stripped of its garnish, Petitioner's argument must be that although the district court judge was acceptable if he found in Petitioner's favor, he must be disqualified because he found in Respondents' favor, and that it was proper for Petitioner to postpone the disqualification issue until the judge had ruled. Indeed, Petitioner conceded as much in the petition for writ of mandamus:

> Once the district court indicated that it intended to subject Petitioner to a full-blown antitrust trial under threat of treble damages

> without giving this Court [of Appeals] an opportunity to address its controversial antitrust standing decision, and given the continuing issue of the appearance of judicial partiality, Petitioner has had little choice but to petition this Court for a Writ of Mandamus.

Petitioner's petition p. 14.

To grant Petitioner's petition under these facts "would encourage parties to withhold recusal motions pending the resolution of their disputes on the merits, and then if necessary invoke § 455 in order to get a second bite at the apple." *E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d at 1295.

Also, as the Court of Appeals points out, (App. 33a) an end-of-case appeal is entirely appropriate. In order to insure that a writ of mandamus "only will issue in extraordinary circumstances, this court has required that a party seeking issuance have no other adequate means to attain the relief he desires," *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35, 66 L.Ed. 193, 101 S.Ct. 188 (1980) (per curiam). Because an end- of-case appeal is a matter of right as opposed to discretion, Petitioner has other means to seek to effectuate the relief it desires here.

IV.

"ISSUES OF TIMING" DO NOT RENDER THE COURT OF APPEALS' DECISION IMPROPER.

The issue of Petitioner's failure to take any action when it knew of the district court's disclosure and its counsel's waiver, (January 12, 1994, in the case of lead counsel, and January 14, 1994 in the case of the corporate Petitioner's in-house counsel,

App. 95a, 98a, and 102a) is fully explicated by the court below. Though lead counsel claims to have been hampered by a snowstorm in Washington, D.C., no explanation is provided as to why Maine counsel did not simply notify the court in a timely fashion. The Court of Appeals quite properly followed the reasoning in *Apple v. Jewish Hosp. & Medical Ctr.*, 829 F.2d 326, 334 (2nd Cir. 1987) ("a movant may not hold back and wait, hedging its bets against the eventual outcome") and *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) (Counsel, knowing the facts claimed to support a § 455(a) recusal for appearance of partiality may not lie in wait, raising the recusal issue only after learning of the court's ruling on the merits.") *cert. denied*, 481 U.S. 1016 (1987) (App. 32a). The First Circuit simply and rightly refused to countenance such behavior in this case.

V.

THE OPINION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE HOLDING IN *LILJEBERG* ON MATTERS OF REMEDY.

Petitioner argues that if this court were to rule that the district court judge should have recused himself, the district court's order of January 19, 1994 denying Petitioner's motion to dismiss must be withdrawn. In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Supreme Court noted that § 455 does not, on its own, authorize the reopening of closed litigation. *Liljeberg* at 863. Nor does the statute authorize the court to withdraw an order. And although Petitioner originally moved the district court to recuse itself *and* to vacate its order denying Petitioner's motion to dismiss, clearly the latter relief would have been prohibited. *El Fenix De Puerto Rico v. M/Y Johanny, etc. et al.*, No. 93-1493 slip op. at p. 13 (1st Cir. September 26, 1994) ("recused judge should take *no further action* except to enable administrative reassignment of the

case.") (emphasis added). The Supreme Court in *Liljeberg* directs a court facing such an issue to look for guidance to Rule 60(b)(6), aptly entitled "Relief from Judgment or Order."

Furthermore:

> where no actual bias is at issue, where the question is solely one of appearances, judicial actions already taken are not necessarily rendered invalid because of circumstances that violate § 455(a). As we read the Supreme Court's *Liljeberg* opinion, we are to fashion retrospective relief with an eye towards a just result.

In re Allied Signal, Inc., 891 F.2d 974 (1st Cir. 1989). *See also Duke v. Pfizer, Inc.*, 668 F. Supp. 1031 (E.D. Mich. 1987) (a new trial cannot be obtained merely based upon the fact that a judge should have been recused).

As stated in *Russell v. Lane*, 890 F.2d 947, 948 (7th Cir. 1989). "Both the need for finality and a common-sense aversion to frittering scarce judicial resources militate against an inflexible rule invalidating all prior actions of a judge disqualified under § 455(a)." *El Fenix De Puerto Rico v. The M/Y Johanny, etc. et al.*, slip op. at p. 13. *Also see United States v. Murphy*, 768 F.2d 1518, 1541 (7th Cir. 1985).

Petitioner disagrees with the district court judge's denial of its motion to dismiss on standing issues. It may pursue that disagreement through normal appellate channels. But it has not shown that enforcement of the order would be unjust; and that is the standard it must meet if it wishes to vacate the order now.

VI.

THE ISSUES PRESENTED DO NOT JUSTIFY CERTIORARI REVIEW.

It is Petitioner's burden to establish that the district court judge's refusal to recuse himself constituted an abuse of discretion and that Petitioner is indisputably entitled to the extraordinary relief of a writ of certiorari. Petitioner has failed to cite any case or statute which when applied to the undisputed facts of this case supports such relief, much less compels it. At bottom, it is clear that (1) the representation of the district court judge by Attorney Petruccelli does not create a reasonable basis for doubting the district court judge's impartiality in presiding over a case in which Attorney Petruccelli's partner's client is a litigant, (2) Petitioner's express waiver is fully effective, (3) Petitioner's conduct in waiting until after the substantive decision had been made on Petitioner's motion for dismissal constitutes a separate and distinct waiver, and (4) in any event, the district court judge's order denying Petitioner's motion to dismiss must stand.

CONCLUSION

Petitioner's motives and strategy are transparent. Following the district court's denial of Petitioner's motion to dismiss, Petitioner has used every procedural arrow in its quiver to circumvent or delay the effectiveness of that order. Petitioner's motion for recusal was denied on May 12, 1994. Petitioner waited to file its Petition for a writ of mandamus until after the district court judge's June 21, 1994 denial of Petitioner's motion to certify the standing issue for appellate review.

Plaintiff, a disgruntled and pertinacious

> litigant, seeks review of the court's Opinion and Order .... The short answer to this inarticulate allegation is that the disqualification statutes were never meant to serve as a substitution for reexamination, review or appeal where the alleged bias is predicated on an adverse ruling or decision in the past or possible expectation that a pending or present matter might be decided adversely.

Carbana v. Cruz, 595 F. Supp. 585 (D. P.R. 1984).

It has now been years since the Complaint was filed. At this point, because of Petitioner's seemingly endless array of motions, its petition for mandamus and the instant petition, the scheduling conference has yet to be held. In reality, Petitioner seeks appellate review of the district court judge's denial of its motion to dismiss. That cannot be accomplished under the guise of a petition for a writ of mandamus or certiorari seeking the district court judge's recusal.

For the reasons stated above, and on the basis of the further discussion of the facts and case law set forth in the opinion of the district court's denial of recusal and the First Circuit's majority opinion, the petition should be denied.

Respectfully submitted,

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No. 95-1327

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

IN RE CARGILL, INCORPORATED,
Petitioner,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY BRIEF

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12 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases

In Re Union Leader Corp., 292 F.2d 381 (1st Cir. 1961).) 7

Statutes:

28 U.S.C. § 455 ..... passim

28 U.S.C. § 1292(b) 7

Miscellaneous:

Code of Judicial Ethics, Canon 3 ..... passim

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PETITIONER'S REPLY BRIEF

REPLY ARGUMENT

Respondents rely primarily on a series of factual contentions -- all to the effect that petitioner's attorneys failed to act in some way, and at some time, to initiate, properly to react to, properly to communicate as to, and properly to seek review of, actions of the district judge that violated both the disqualification provisions of 28 U.S.C. § 455(a) and the waiver provisions of § 455(e). (Canon 3 of the Code of Judicial Ethics, notably, is not mentioned in respondents' brief.)

These contentions are erroneous and implausible, but more importantly, they represent a viewpoint antithetical to the rationale underlying § 455 and Canon 3. Because this viewpoint is reflected in the majority opinion below, it has the potential to foster the erroneous disposition of important issues arising in the sensitive area of judicial ethics.

Section 455 was enacted, and Canon 3 was adopted, for the very purpose of addressing the problems raised by *ineffective* responses of lawyers in just these situations. Indeed, the premise underlying Congress' adoption of § 455 was that counsel, by reason of the judge's power to affect counsel's interests, might agree to a judge's sitting, accommodate the judge's explanations, avoid offensive inquiries, and otherwise find ways to circumnavigate confrontation. Congress' response to these concerns was not to underscore the responsibilities of the attorney. Instead Congress enacted a series of protections that place responsibilities on the judge, involving *sua sponte* recusal and specific prerequisites for "waiver," including the *direct* involvement of the client -- all of which are simply ignored in respondents' brief and discounted in the majority opinion below.

Because the enactment of § 455 itself was impelled by the vignettes, set forth in the legislative history, that illustrated the inherent pressures on counsel, it is particularly relevant to examine the factual contentions made by respondents in light of the concerns raised by Congress and the Judicial Conference:

(1) Respondents first note that at the January 12, 1994 hearing, Petitioner was represented by "experienced litigators" who did not lack "legal competence" (Respondents' Brief in Opposition ("R. Br.") at 11); that local counsel "did not seek any further detail before he stated that *his client* had no

objection" (R. Br. at 12, emphasis added);[1/] that the judge did not "prevent" counsel from conferring with the client (R. Br. at 12); that counsel "voluntarily and unequivocally stated that there was no objection" (R. Br. at 14); that if "petitioner has any dispute as to the adequacy of this representation . . . it must take up those issues with its former counsel" (R. Br. at 13); and that "a party is bound by the actions and decisions of its counsel." (*Id.*)

In contrast, the history underlying the Canon and § 455 makes clear that, *ab initio*, the conduct of counsel in the presence of the judge in such situations is presumed to be compromised and ineffective. (*See* Petition for Writ of Certiorari ("Cert. Pet.") at 12-17.) As a result, § 455 allows no waiver except by a "party"; and the Canon, more explicitly, states that there can be no waiver unless the "party" is involved and that the process must take place outside the presence of the court. App. 9a. These provisions do not allow a trial judge to accept an attorney's "waiver" and then require the client to remediate the judge's statutory violation by taking the initiative to contact the judge if it should wish to challenge his or her impartiality. Indeed, imposing such a requirement would place the client in the position of directly challenging the judge -- a circumstance to be avoided even more than that of having the lawyer do so. In contrast, the intent underlying § 455(e) and Canon is that the judge remain unclear as to the source of any reluctance to endorse his or her continuing to preside. (*See* Cert. Pet. at 13, 15.)

1/ Local counsel did not state that his "client" had no objection (Appendix ("App.") 35a); however, it is significant that the statute requires waiver by the client, 28 U.S.C. § 455(e), that none was obtained, and that respondent felt the need to make it seem that there had been one.

(2) Respondents next note that petitioner's local counsel called petitioner's antitrust counsel just after the conference and communicated the events (including the judge's disclosure, the so-called "waiver," and the subsequent announcement by the judge that he intended "to be in a position to file" a decision on the pending motion to dismiss in a "week or so" (R. Br. at 15, see App. 36a); that prior to the decision on the motion to dismiss, no notice was received that petitioner was disputing the so-called "waiver"; and then, only on February 13, 1994, did petitioner provide a letter to the Court indicating the need for recusal and for withdrawal of the opinion. (R. Br. at 15.) "Petitioner had ample opportunity to communicate . . . with the clerk at least to put the court on notice" that it wished to consider revocation of the "waiver." (*Id.*) Petitioner "chose to remain silent for several weeks." (*Id.*) "Petitioner need not have filed a complete brief immediately; it needed to only notify the court that there was an issue . . ." (*Id.*) "Petitioner has never even alleged . . . that it decided to move for recusal prior to receiving the January 19, 1994 decision." (R. Br. at 16.)

Conspicuously absent from respondents' account is the role and welfare of the "party," Cargill. That party exclusively under § 455(e), and explicitly under Canon 3, should have been involved before any claim of "waiver" even arose. Inclusion of the "party" and its welfare dramatically changes the story and its implications. Because both the trial judge and respondents' counsel had withheld knowledge of their privileged relationship for several weeks, there was no advance notice to Cargill -- even the January 12 hearing was called without giving notice of its subject matter. In the rush thereafter created by the failure to give advance notice, the misprocured "waiver" and the judge's subsequent announcement that the opinion might soon be rendered, the party could not be contacted until the afternoon of Friday, January 14, and then not at a time when

it could obtain advice. (App. at 98a.) Further, because of the foregoing facts, the client's situation had been greatly complicated. It was unclear whether its rights had already been preempted by the actions of local counsel, under circumstances in which he properly should not have been required to act at all. It was unclear whether the unsettling reaction felt with regard to the judge's special relationship with the Petruccelli firm was supported by legal authority. The client was nevertheless, according to respondents, called upon to initiate a communication to the judge that it was uncomfortable with his integrity.

The suggestion in respondents' brief that, at the least, the clerk of the court should have been notified in this short interval is the very *first* time respondent has made that proposal in the two years that this matter has been pending. It is obviously based upon petitioner's *own* research into procedures suggested by the Judicial Conference and the 5th Circuit Court of Appeals for dealing with the delicate issue of waiver (but in *less* strained circumstances -- *i.e.*, where the party's own counsel has not already been drawn into an improper "waiver"). This information about the law of disqualification, including the suggestions for dealing with the problems generated by the trial judge's actions, was pulled together well after the short window of time relevant to the events in this case.

Indeed, the flaw in respondents' contention that there was some wrong in petitioner's communicating its position to the judge on February 13, 1994 (R. Br. at 15) is that the *short* elapsed time arose from efforts to act *responsibly*. If petitioner had objected on January 18 or January 20, 1994, it would presumably fare better under respondents' argument. (R. Br. at 15.) However, petitioner would have had to do so without conducting any responsible inquiry into its rights, which were

problematical given the complexities that the judge's violations of the statute had engendered. Respondents are entirely correct in stating that petitioner does not assert that before January 19, 1994 petitioner had "*decided* to move for recusal" (R. Br. at 16), because it would have been an extremely high-risk decision without an informed basis. Instead, petitioner asserts that following the first substantial communication with its client on January 18, counsel undertook to pursue the disqualification matter given the complicated circumstances involved. (App. 95a-96a.)

Notably, all of these *judge-engendered* difficulties occur in circumstances in which the judge's failure to follow disqualification procedures also has the effect of undermining relationships fundamental to the conduct of the case. The initial problem that § 455 addresses is not only the judge's apparent conflict, but also counsel's conflict of interest that arises when a judge creates a situation of direct interaction with counsel on the matter of his or her disqualification and waiver. The lawyer's relationship with the court may be sufficiently important to the lawyer's professional career that it interferes with his or her assessment of the client's possible need to object to the judge's presiding. The attorney-client relationship, however, suffers an even greater strain once counsel is improperly drawn into such a "waiver," because there is a natural and understandable tendency to defend what has been done. That fact compromises further counsel's ability to give the disinterested advice needed by the client regarding the trial judge's actual predisposition, given the appearance of partiality. These additional difficulties result directly from the

judge's violations of the statute and would not be present if the rules had been followed.[2/]

(3) Finally, respondents contend that counsel also acted improperly in waiting to file the petition for mandamus until the district judge had declined to give the Court of Appeals an opportunity to review his controversial antitrust standing decision by certifying the decision under 28 U.S.C. § 1292(b). (R. Br. at 16-17.) Respondents omit to state that there was guidance in the First Circuit to the effect that an *alternative* to recusal might be found in just such a certification. (When a judge is "embarrassed by a claim of bias made while he sits, he can certify the case for interlocutory appeal under 28 U.S.C. § 1292(b)" even though he regards the claim of bias as insufficient. *In Re Union Leader Corp.*, 292 F.2d 381, 384 n.3 (1st Cir. 1961).) If there is anything more odious to a practicing lawyer than having to move for recusal of the judge presiding over a matter, it is seeking a petition for mandamus to compel the judge's disqualification. Petitioner followed the First Circuit's proposal here as an alternative that offered possible avoidance of that kind of confrontation.

Thus, the types of arguments that are made by respondents -- and reflected in the majority opinion below -- are the reasons why a writ of certiorari should be granted in this case. Together, they endorse a manner of dealing with the matters involving judicial integrity that is damaging to the

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2/ Cargill's local counsel was unable to participate further. (App. 81a.) Respondents assert that petitioner must "take up" this matter with "its former counsel." (R. Br. at 13.) It was, however, the judge's violations of statute that created the pressures that both initially and ultimately compromised the position of local counsel.

system because it undermines the appearance of judicial impartiality and is contradictory to § 455 and Canon 3.

A few additional points merit attention:

1. Respondents argue, without citation, that the "cases are undivided" in supporting their position that the Petruccelli law firm's relationship with the district judge created no appearance of partiality that would require the judge to recuse. That position is just erroneous. (R. Br. at 11.) There are no cases supporting it. (*See* Cert. Pet. at 3 n.3.)

2. Absent from respondents' brief is even a single mention of Canon 3 of the Code of Judicial Ethics. Respondents' implicit argument that the Canon should be ignored strongly suggests that respondents' position lies very far from the respected consensus on judicial ethics embodied in the Canon.

3. Respondents have advanced not a single argument that would support the bizarre result of deferring this significant matter until the ultimate appeal of this case. (*See* Cert. Pet. at 18-20.)

4. Respondents do not deny that there is a conflict among the circuits.

CONCLUSION

Here, both the majority opinion and Judge Campbell's dissent in the court of appeals indicate that the trial judge should *not* have continued to sit and that petitioner had the right to the judge's disqualification. However, respondents and the majority opinion contend, ironically, that the judge's *failure* to adhere to either 28 U.S.C. § 455 or Canon 3 of the Code of Judicial Ethics has deprived petitioner of that right. The

majority opinion would return the case -- still in its initial stages -- to a judge that concededly should not continue to sit. Such an action would subvert the rules developed to address this extremely important area. Accordingly, the Court should review this case to establish a different course for this and future dispositions.

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